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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PETER DiFRONZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinion of the Court Below	2
Statement of Jurisdiction	2
Questions Presented for Review	2
Statutes Involved	2
Statement of the Case	4
Reasons for Granting Writ	9
Conclusion	17
Appendix I—Opinion of the United States Court of Appeals for the Seventh Circuit	App. 1
Appendix II—Judgment Order of the United States Court of Appeals for the Seventh Circuit	App. 9
Appendix III—Statutes Involved	App. 10

AUTHORITIES CITED

PAGE

Blumenthal v. United States, 1947, 332 U.S. 539, 68 S.Ct. 248 13

Garner v. Louisiana, 1961, 368 U.S. 157, 82 S.Ct. 248 9

Luria v. United States, 1913, 231 U.S. 9, 34 S.Ct. 10 14

McNabb et al. v. United States, 1943, 318 U.S. 332, 63 S.Ct. 608 9

Nye & Nissen v. United States, 1949, 336 U.S. 613, 69 S.Ct. 766 12

Peoni v. United States, 2 Cir., 100 F.2d 401 .....11, 13

Thompson v. City of Louisville, 1960, 362 U.S. 199, 80 S.Ct. 624 9

Tot v. United States, 1943, 319 U.S. 463, 63 S.Ct. 1241 .....11, 14

United States v. D'Antonio, 7 Cir., 342 F.2d 667 ....15, 16, 17

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PETER DiFRONZO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Peter DiFronzo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on April 29, 1965, and made final by an order of said Court entered on May 27, 1965, denying a petition for rehearing filed by the Petitioner.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction entered in the United States District Court for the Northern District of Illinois, Eastern Division, is as yet unreported, but is printed, together with the dissenting opinion of Circuit Judge Swygert, in Appendix I hereto, *infra*, p. App. 1.

STATEMENT OF JURISDICTION

Petitioner was convicted of the unlawful interstate transportation of stolen merchandise, and of conspiracy so to do, in violation of Sections 2314 and 371, Title 18, United States Code.

The judgment of the Court of Appeals affirming the judgment of conviction was entered on April 29, 1965. A timely Petition for Rehearing was filed and was thereafter denied on May 27, 1965.

The jurisdiction of this Court is invoked under the provisions of Title 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Where the evidence fails to establish that a defendant has any interest in or association with an interstate transportation of stolen goods, but establishes, at most, only that the defendant is involved in an intrastate shipment of stolen goods, does not a conviction for violation of Section 2314, Title 18 United States Code, and conspiracy to violate that Section deprive the defendant of Due Process of Law? Concurrently, will not this Court exercise its supervisory authority over the lower federal courts to insure that impermissible inferences are not in-

dulged to secure convictions in federal courts where there is a total failure of proof indicating federal jurisdiction?

2. Over the objection of a defendant in a criminal case, may a jury separate overnight in the midst of its deliberations on a verdict and return the following morning to continue and complete its deliberations?

STATUTES INVOLVED

The relevant portions of the statutes claimed to have been violated, Section 371 and Section 2314, Title 18, United States Code, are set forth in Appendix III, *infra*, p. App. 10.

STATEMENT OF THE CASE

Petitioner, Peter DiFronzo, was indicted with Medo Calzavara, John Torello and Anthony Daddino and charged with transporting stolen merchandise of the approximate value of $75,000 in interstate commerce, in violation of Section 2314, Title 18, United States Code, (App. 1); and conspiring to transport the same merchandise in interstate commerce, in violation of Section 371, Title 18, United States Code. (App. 1-2) Following a jury finding of guilty, Petitioner DiFronzo was sentenced to a term of ten years on the substantive count and five years on the conspiracy count; said sentences were ordered to run concurrently. (App. 10). Defendants Calzavara and Daddino were similarly sentenced. (App. 10). Following the failure of the jury to agree on a verdict as to the defendant Torello, the trial Court granted his motion for a judgment of acquittal at the close of all of the evidence. (App. 10).

Petitioner questioned, *inter alia,* in the United States Court of Appeals for the Seventh Circuit, whether the government proved a *prima facie* case as to his participation in either the substantive or conspiratorial offense charged in the indictment, and whether the jury was properly permitted to separate, over night, during its deliberations. (Opinion, Appendix I, p. App. 1)

On April 29, 1961, unidentified robbers held up two employees at a Certified Grocery warehouse in Forest View in Illinois. Certain trailers containing cigarets, razor blades and hosiery were taken in this robbery. The Government would contend, and petitioner herein would have no reason to dispute, that this merchandise was transported to a farm owned by the defendant Calzavara near Grayslake, Illinois, and there stored in a barn. (App. 14).

Part of the merchandise was recovered from a nearby farm owned by the defendant Calzavara's brother, (App. 29), a second portion was recovered from a truck which was driven to Wisconsin from Calzavara's farm by the defendant Daddino on May 2, 1961, (App. 30), and a third portion was recovered from a truck which was driven to Stone Park, Illinois, from Calzavara's farm by the Petitioner, DiFronzo, on May 2, 1961. (App. 34-35).

Prior to the aforementioned recovery of the stolen goods, agents of the Federal Bureau of Investigation had maintained a surveillance over events at the Calzavara farm. On April 30, 1961, a tractor and a trailer arrived at the farm in the early morning. (App. 14) Shortly after midnight a late model sedan pulled into the yard and an unidentified man emerged and entered the Calzavara house. Another tandem tractor arrived shortly thereafter. Sometime later the sedan and the tandem trailer left. (App. 15)

At 12:25 P.M. on May 1, 1961, a light colored 1961 Pontiac entered into the yard and drove behind trailers that were parked there. This automobile, driven by one man, left the farm at 7:56 P.M. the same day. (App. 15) At about 8:00 P.M. the Pontiac was followed from the vicinity of the farm to the Town of Grayslake, Illinois. The driver was identified as the Petitioner. (App. 36, 38)

Earlier that day, at about 5:30 P.M. the defendant Daddino had rented a "Rollem" tractor, number 504, from a company in Chicago, Illinois. (App. 33) At approximately 8:00 P.M. this vehicle was observed by the side of a road in the general vicinity of Calzavara's farm. The defendant Torello was standing on the running board. The vehicle was then driven away toward the west, followed by the 1961 Pontiac. (App. 19, 32) At approximately 8:21 P.M. the tractor and trailer, followed by the 1961 Pontiac, were observed to drive into the Calzavara farm yard. (App. 15)

At 11:53 P.M. a different tractor-trailer pulled out of a warehouse located on the Calzavara farm and turned east on the highway. F.B.I. Agents in the vicinity were alerted. At 12:11 A.M. on May 2, the 1961 Pontiac left the farm and turned east on the highway. Again the F.B.I. Agents were alerted. (App. 16) The Pontiac, containing three people, was seen to proceed in the same direction as the tractor-trailer. (App. 36) At about this time, the tractor-bearing the legend "Bar M Rodeo, Grayslake, Illinois," and pulling a silver-colored trailer, bearing the legend "Meyer Produce," was followed by F.B.I. agents from the area near the Calzavara farm to a restaurant in Wisconsin. In the vicinity of Union Grove, Wisconsin, the Pontiac, bearing Illinois license plates LC 1025, passed the trailing F.B.I. automobiles and the tractor-trailer at a high rate of speed. When the tractor-trailer stopped at the restaurant, the defendant Daddino alighted therefrom and returned to Chicago by "hitching" a ride from another truck driver, one Sylvester Schneider. (App. 30, 31) The abandoned tractor was owned by the defendant Calzavara. (App. 54)

At 5:19 that same morning, May 2, 1961, the 1961 Pontiac was observed in the Calzavara yard; the surveilling Agent had not seen it return. Approximately twenty minutes later three men drove the Pontiac east from the farm. (App. 17-18) Minutes later a dark tractor pulling a large aluminum trailer left the farm and proceeded west. F.B.I. Agents in the vicinity were alerted. (App. 18) Two F.B.I Agents followed this vehicle which was driven by Petitioner DiFronzo. (App. 34) The tractor trailer stopped near a snack shop in Stone Park, Illinois, and the driver, DiFronzo, was apprehended as he fled from the scene. (App. 34-35, 37) The tractor-trailer bore the name "Rollem" and number 504. (App. 38)

Other trucks and passenger vehicles were observed to enter and leave the Calzavara property during the period of surveillance. (App. 14-18)

Approximately $70,000 worth of property was recovered in Wisconsin, $70,000 worth of property was recovered in Stone Park, Illinois, and $14,000 worth of property was recovered from Calzavara's brother's farm. Approximately $5,000 worth of property was not recovered. (App. 41-42)

Petitioner's Motions for Judgments of Acquittal at the close of the Government's case and at the close of all of the evidence were denied. (App. 43, 62)

After closing arguments and the charge to the jury, the following colloquy took place between the trial court and counsel:

> "The Court: No, my instructions to the Marshal then would be to advise me, permit the jury to continue with its deliberations until I return, which would be 10:30 or thereabouts, at which time I would instruct them as to their duties and let them return to their homes to resume their deliberations tomorrow morning.
>
> "This is the standard practice in the court at this time and I will follow it . . ."
>
> * * *
>
> "Mr. Callaghan: I would have no objection, if your Honor please, if your Honor came back at 10:30, 10:40, whatever the hour might be, to then agreeing

upon a sealed verdict which would be signed, sealed and delivered on Monday morning, but I would have an objection the jury separating.

"The Court: This is standard practice, Mr. Callaghan, and I am going to do it." (Supp. App. Cal., p. 7; Supp. Tr. 7).[1]

* * *

At 11:10 that evening, the jurors advised the trial judge that they needed additional time to deliberate. The court admonished the jurors not to discuss the case overnight, and then excused them for the night, permitting them to separate until 10:00 o'clock the following morning when they were to return for further deliberations. (Supp. App. Cal., p. 7).

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[1] Contained in Reply Brief for Medo Calzavara.

REASONS FOR GRANTING THE WRIT

I.

A conviction of a federal crime in the federal court system based upon an absolute lack of evidence must be repugnant to the Fifth Amendment to the Constitution. This Court has, in recent years, decided that a conviction in a state court which does not rest upon any evidence of guilt violates the Due Process clause of the Fourteenth Amendment. *Thompson* v. *City of Louisville,* 1960, 362 U.S. 199, 80 S. Ct. 624; *Garner* v. *Louisiana,* 1961, 368 U.S. 157, 82 S. Ct. 248. In years past the Court has suggested that identical standards avail in the federal system, and that a conviction there, without evidence, offends the Fifth Amendment. See, *Tot* v. *United States,* 1943, 319 U.S. 463, 63 S. Ct. 1241. The Court has not, however, stated explicitly that the *"Thompson"* and *"Garner"* doctrine has equal application in the federal system. While it would be unrealistic to assume that the doctrine of these two state cases does not apply in the federal system, this case presents the Court with the opportunity to apply the constitutional standard explicitly to the federal courts. Not as an alternative, but as a supplement to the consideration of whether a conviction based upon a lack of evidence violates due process, this Court's supervisory authority over the lower federal courts, which "implies the duty of establishing and maintaining civilized standards of procedure and evidence," (*McNabb et al.* v. *United States,* 1943, 318 U.S. 332, 340-341, 63 S. Ct. 608, 613), should be exercised to insure that impermissible inferences are not indulged to secure convictions which cannot be justified by the evidence.

The evidence against Petitioner below consisted of two related facts. Viewed in the light most favorable to the Government, this evidence shows that Petitioner transported stolen goods from Grayslake, Illinois, to Stone Park, Illinois, during the early morning hours of May 2, 1961. Prior to this, on May 1, 1961, he drove a 1961 Pontiac from the defendant Calzavara's farm, in Illinois, to a location nearby, also in Illinois, where the truck which he later used to transport the merchandise to Stone Park, Illinois, was parked; from that point he followed the vehicle back to Calzavara's farm. Not one fact suggests that Petitioner participated in any manner or degree in the interstate transportation of goods to Wisconsin. The Pontiac, which Petitioner was seen driving on May 1st, was observed following the truck driven by Daddino in Wisconsin on May 2nd. Three persons, not one of whom was identified as the Petitioner, were in that car. That same Pontiac, again occupied by three men other than the Petitioner, left the Calzavara farm only minutes before Petitioner left, in the truck, for Stone Park, Illinois. As a result of this non-exclusive relationship between Petitioner and the Pontiac, there can be no inference that it was Petitioner who followed Daddino to Wisconsin. Circuit Judge Swygert recognized this in his dissenting opinion below. He said:

> "The only evidence which might remotely relate DiFronzo to the violations of which he was found guilty is testimony to the effect that at one time he was seen riding in a Pontiac automobile which at a later time was found to be following the truck making the interstate transportation of the stolen goods. DiFronzo was not in the automobile at the time it was observed to be following the truck from Illinois to Wisconsin. Rather, he was found in another truck transporting stolen goods from one point in Illinois

> to another place in the same state. Moreover, there was no showing that DiFronzo owned the Pontiac or had any participation in its use interstate." (Opinion, Appendix I, *infra,* p. App. 7.)

Moreover, Judge Swygert was on sound ground in rejecting any "remote" inference that DiFronzo was in the Pontiac which followed Daddino. While the existence of a fact essential to guilt is permitted to be inferred from another, if reason and experience support the inference, the inference must be rejected where there is "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot* v. *United States,* 1943, 319 U.S. 463, 467-468, 63 S. Ct. 1241, 1245. So in the present case, it is unreasonable and arbitrary to infer that Petitioner was in the Pontiac on May 2nd, because he was in it on May 1st.

Undoubtedly recognizing that any inference that Petitioner was physically involved in the interstate transportation to Wisconsin on May 2nd was constitutionally and logically impermissible, the Government and the courts below relied upon a theory of vicarious liability. Accordingly, the trial court, in charging the jury as to the substantive count, instructed the jury on the "aider and abettor" theory. (Supp. App. DiFronzo, p. 15).[2] This Court has sanctioned the language of Judge Learned Hand in *Peoni* v. *United States,* 2 Cir., 100 F. 2d 401, 402, to the effect that,

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as

[2] Contained in Brief and Supplemental Appendix for Peter DiFronzo.

> in something that he wishes to bring about, that he seek by his action to make it succeed.'" *Nye & Nissen v. United States*, 1949, 336 U.S. 613, 619, 69 S. Ct. 766, 769-770.

Applying these standards, it is again apparent that the Petitioner could not be convicted as an aider and abettor. The evidence failed to show that the Petitioner had the slightest interest in the goods which moved interstate. It showed that he was interested in goods which moved intrastate, but his interest in these goods did not and could not affect the interstate shipment. The tractor-trailer which Petitioner "escorted" to the Calzavara farm did not move in interstate commerce; it was the truck which Petitioner used in his intrastate transportation. Petitioner's presence at the Calzavara farm, aside from being explained by his obvious interest in the truck and goods which he transported to Stone Park, Illinois, provided no logical basis for assuming that Petitioner had any interest in the interstate shipment. The evidence unerringly demonstrates that the farm was merely a distribution center where parties, otherwise disinterested in each other, could obtain stolen merchandise. Several cars and several trucks not specifically identified entered and left the farm premises during the period between April 30, 1961, and May 2, 1961. (App. 18) In addition, a tandem trailer left the farm shortly after midnight on May 1st (App. 15), another trailer, pulled by a "Rollem" tractor, left the farm at 1:10 A.M. on May 2nd and was abandoned in the City of Chicago later that morning (App. 34); a third truck, driven by Calzavara and carrying large cardboard cartons, left the farm premises at 2:20 A.M. on May 2nd (App. 170); shortly thereafter a fourth truck, also carrying cardboard boxes which had been loaded into it at the farm, left the premises. (App. 17) None of these vehicles were shown to have travelled interstate. Only the tractor-trailer driven

by Daddino travelled interstate. There is no evidence from which it can be inferred that any party had any interest in any merchandise which left the farm, other than such merchandise which he personally transported.

Paraphrasing *Peoni*, there is no evidence from which it can be inferred that the Petitioner associated himself with the transportation of goods to Wisconsin, or that he participated in it as something he wished to bring about, or that he sought by his actions to make it succeed. The evidence showed only that Petitioner's actions and associations were all centered about the intrastate transportation to Stone Park and the vehicle which was used in that transportation. Circuit Judge Swygert concluded:

> "The Government has been unable to point to any evidence which might link DiFronzo with the interstate offenses charged. His actions tended to show a participation only in an intrastate transportation of stolen items. There is no evidence to show that he conspired in planning the interstate activity or that he aided and abetted in the conduct thereof. Although his activity might well warrant a conviction in a state criminal proceeding, it is not a proper basis for prosecution under the federal statutes. Accordingly, the evidence fails to sustain the verdict against this defendant." (Opinion, Appendix I, p. App. 8)

As indicated above by Circuit Judge Swygert, what has been said herein with respect to the total lack of proof concerning the substantive charge applies with equal vigor to the conspiracy charge. Conspiracy imports a "concert of purpose" (See, *Blumenthal* v. *United States*, 1947, 332 U.S. 539, 558-559, 68 S. Ct. 248, 257; *United States* v. *Peoni*, 2 Cir., 100 F. 2d 401, 403), and the Record is devoid of any evidence showing a common interest between Daddino and Petitioner to transport merchandise to Wisconsin.

The real gravamen of Petitioner's complaint and request that this Court notice his cause lies in the fact that the element which has not been proven is the essential element for purposes of federal jurisdiction. Without proof of interstate transportation the federal government has no legitimate concern, consistent with the Ninth Amendment, in Petitioner's activities. The Government cannot point to one fact in the Record showing an association between Petitioner and Daddino's interstate transportation of stolen merchandise. It must ask that guesswork be indulged in so that Petitioner may be identified as one of the persons interested in Daddino's interstate transportation of the stolen goods. But, as Circuit Judge Swygert recognized below and as this Court intimated in *Tot* v. *United States*, 1943, 319 U.S. 463, 63 S. Ct. 1241, evidence of essential elements cannot be supplied by inference where there is no rational connection between the fact proved and that sought to be inferred. If such inferences were permitted, due process would be denied. See, *Luria* v. *United States*, 1913, 231 U.S. 9, 25, 34 S.Ct. 10. If such inferences were permitted, the entire concept that "* * * a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged," would be destroyed. (See, *Tot* v. *United States, supra*, 319 U.S., at page 473, 63 S.Ct., at page 1248 [concurring opinion].) And, as demonstrated by the instant case, the present distinction between crimes recognizable by the states only and crimes recognizable by the federal authorities vanishes in the wake of an inference that permits a purely intrastate transaction to be converted into an interstate offense. The Court is urged to correct this situation.

II.

On February 9, 1965, the United States Court of Appeals for the Seventh Circuit ruled that juries in criminal cases,

once they have started their deliberations, may not separate overnight, to their homes, then to resume their deliberations in the morning, over the objection of the defendants. *United States* v. *D'Antonio*, 7 Cir., 342 F. 2d 667.[3] In a well reasoned opinion, one judge dissenting, the Court held that the historical right of a defendant to have his case decided "by a jury whose secret *deliberations* are not interrupted by the court's order permitting them to *separate* before a verdict has been reached," (342 F. 2d at page 669) was to be enforced in the Seventh Circuit. In the instant case, decided not one month after the petition for rehearing in *D'Antonio* was denied, the court below refused to apply the rule laid down in *D'Antonio*. Instead the court held:

> "• • • the record discloses that the trial court counsel for each of the defendants agreed to the procedure outlined and followed by the trial judge • • • [in permitting the jury to separate.]" (Opinion, Appendix I, p. App. 2)

As an aside, the court added in a footnote that the defendants did not claim that the separation resulted in anything to their prejudice.

Petitioner Di Fronzo respectfully submits that the opinion of the court below, insofar as it states that the defendants agreed to the separation of jurors, is in error. The Record clearly and explicitly shows that, after the trial court announced that it proposed to allow the jurors to separate for the night if they failed to arrive at a verdict by 10:30 P.M. and then permit them to resume their deliberations the following morning, Mr. Callaghan (trial counsel for Petitioner Di Fronzo), addressed the court as follows:

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[3] A Petition for Rehearing filed by the Government was denied, *en banc*, on April 9, 1965.

> "I would have no objection, if your Honor please, if your Honor came back at 10:30, 10:40, whatever the hour might be, to then agreeing upon a sealed verdict which would be signed, sealed and delivered on Monday morning, *but I would have an objection* [*to*] *the jury separating.*
>
> "The Court: This is a standard practice, Mr. Callaghan, and I am going to do it." (Supp. App. Cal., p. 7; Supp. Tr., p. 7).[4] (Emphasis added.)

Counsel could hardly have been more emphatic in his objection, and the trial court could not have expressed clearer recognition of the objection.

In view of the Seventh Circuit's discussion in *D'Antonio,* which suggested that the historical right to contain the jury during its deliberations was well founded on considerations of secrecy and immunization from outside influences during a critical stage in the proceedings, it is difficult to comprehend the lower court's footnote claim that the defendants did not demonstrate actual prejudice. Nor did D'Antonio. It would be almost impossible to demonstrate prejudice. But in these days of television and newspaper saturation coverage, it is not unreasonable to assume, as the Seventh Circuit originally did in *D'Antonio,* that the proscription against separation is a prophylactic devise which recognizes and admits of the existence of prejudice *per se.*

This Court should grant the writ requested, not only to review and correct the misstatement of the record by the court below, but to exercise its supervisory authority over

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[4] Contained in Reply Brief for Medo Calzavara, p. 7.

and decide a problem in federal criminal procedure which is sure to cause conflict in the various circuits in the future.[5]

CONCLUSION.

For the above and foregoing reasons it is prayed that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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On the Brief.

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[5] The statement of facts contained in the opinion in *United States* v. *D'Antonio*, 7 Cir., 342 F.2d 667, 668, indicates that the trial judge there had been advised that separation was being permitted "all over the United States" except in the State of Illinois, and that the District Courts in Illinois were beginning to follow the practice throughout the rest of the country. The trial judge in the instant case, while not as explicit, indicated that separation was, or had become, "a standard practice." (Supp. App. Cal., p. 7) The opinion in *D'Antonio*, of course, indicates that the practice is not widespread.

APPENDIX I

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1964 — APRIL SESSION, 1965

No. 14507
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-vs-
PETER DIFRONZO and
MEDO CALZAVARA,
Defendants-Appellants.

No. 14508
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-vs-
ANTHONY DADDINO,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

April 29, 1965

Before HASTINGS, *Chief Judge,* CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge* — The defendants, Peter DiFronzo, Medo Calzavara, and Anthony Daddino, were convicted, after a jury trial, on both counts of a twoscount indictment which charged the interstate transportation of

merchandise known to have been stolen, and conspiracy to so transport such merchandise, in violation of 18 U.S.C.A. § 2314 and § 371, respectively. Each was sentenced to a term of ten years on the substantive count and to a term of five years on the conspiracy count, the sentences to run concurrently.

Without reciting the evidence in detail it is sufficient for the purpose of the issues presented by the defendants' appeals to observe that the record reveals that on April 29, 1961, certain trailers containing a large quantity of cigarettes, razor blades, and hosiery were stolen from the premises of a grocery warehouse in Forest View, Illinois, and during the next few days there was concerted action on the part of the defendants in the transportation of the stolen merchandise. On the morning following the robbery the stolen merchandise was brought to the farm premises of the defendant Calzavara, near Grayslake, Illinois, and placed in a barn. Portions of the merchandise were thereafter transported to other locations, including one in Wisconsin.

On appeal all of the defendants contend the District Court erred in permitting the jury to separate after it had commenced its deliberation. But the record discloses that the trial court counsel for each of the defendants agreed to the procedure outlined and followed by the trial judge in this respect.[1] The defendants are in no position to claim error in this connection.

Defendants DiFronzo and Daddino urge that the trial court erred in overruling their respective motions for a severance. Such motions were made toward the conclusion of the trial after counsel for Calzavara during the cross

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[1] Moreover, there is no claim that the separation actually resulted in anything prejudicial to any of the defendants.

examination of a government witness elicited from the witness that Calzavara had told him that Calzavara's participation in the events involving the transportation of the stolen merchandise was produced by threats against his life by persons not identified. But the fact that a co-defendant states that his participation was caused by threats by a person or persons unknown and unidentified is not a basis for a severance. It evidences no demonstrable prejudice to any of the other co-defendants.

DiFronzo additionally urges that the evidence is insufficient to support his conviction on either count. From our examination of the record, and we must view the evidence and the reasonable inferences which may be drawn therefrom in the light most favorable to the government (*Glasser* v. *United States,* 315 U.S. 60, 80), we are satisfied that the evidence warrants the conclusion, implicit in the jury's verdict, that DiFronzo participated in both the substantive and the conspiratorial offenses.

Daddino makes the further contention that the court erred in declaring a mistrial and subsequently denying his plea in bar asserting former jeopardy. The trial commenced on September 12, 1963. On September 13, 1963, after three government witnesses had testified, and the fourth was on the stand, the noon recess was taken. An altercation took place between the prosecutor and counsel for one of the defendants. It involved the attempt of the prosecutor to regain possession of material tendered to defense counsel pursuant to a Section 3500[2] request. Eight of the jurors witnessed the episode. Defendant Calzavara moved for a mistrial based on the incident. The court interrogated the jurors, individually, *in camera.* Although the court's "ultimate impression" was that the episode

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[2] 18 U. S. C. A. § 3500.

would not in fact influence the jurors he concluded that from the point of view of all concerned it would be better to proceed to try the case before another jury. Accordingly, he withdrew a juror and declared a mistrial. Daddino had not joined in the motion for a mistrial but he made no objection thereto. No inquiry was made as to the position of Daddino in the matter. The trial at which the convictions resulted commenced after Daddino's plea of former jeopardy was denied.

It is evident from the record that the concern of the trial judge was to secure for the defendants a fair trial before an impartial jury unaffected by whatever reaction, conscious or unconscious, the incident might have engendered in the minds of the jurors who witnessed it. The rationale of *Gori* v. *United States*, 367 U.S. 364, 368, is applicable here. It was there pointed out:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. *Simmons* v. *United States*, 142 U.S. 148; *Logan* v. *United States*, 144 U.S. 263; *Dreyer* v. *Illinois*, 187 U.S. 71, 85-86. It is also clear that 'This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served . . . ,' *Brock* v. *North Carolina*, 344 U.S. 424, 427, and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion."

The admonitions expressed in *Downum* v. *United States*, 372 U.S. 734, relied upon by the defendant, do not in our judgment serve to invalidate the teaching of *Gori*. See

United States v. *Tateo*, 377 U.S. 463, 467. We perceive no basis in the instant case upon which to attribute error to what appears to be an informed exercise of discretion on the part of the trial judge.

Calzavara contends that the District Court erred in not dismissing the indictment as to him on the grounds that it is identical to a prior indictment which was returned by a federal grand jury in Milwaukee, Wisconsin, but was dismissed on the ground that the defendant was not advised of certain of his constitutional rights before testifying, pursuant to subpoena, before that grand jury. The basis for the dismissal of the previous indictment is fully set forth in *United States* v. *DiGrazia* (D.C. N.D. Ill.) 213 F. Supp. 232, and it was there observed (p. 233) that:

> " . . . it is clear from an examination of his [Calzavara's] testimony . . . that no direct incriminating statements of fact were made by him."

The denial of the defendant Calzavara's motion to dismiss the subsequent indictment is supported by *Lawn* v. *United States*, 355 U.S. 339, 348-350, and *Costello* v. *United States*, 350 U.S. 359, 363. The government's response to the motion unequivocally stated that no testimony was wrongfully, unlawfully or illegally obtained from Calzavara at any time. Such an avowal is a sufficient basis for the denial of a motion to dismiss predicated upon alleged use of illegal testimony before the grand jury. *Lawn* v. *United States*, *supra*. And, the court cannot inquire into the sufficiency of the evidence actually presented. *Tinkoff* v. *United States*, 7 Cir., 86 F. 2d 868, 877.

Calzavara predicates error on the District Court's rulings sustaining objections to his testifying concerning the content of conversations in which persons unknown to and unidentifiable by the witness are alleged to have threat-

ened him with violence or death unless he participated in the acts about which he testified. He argues that he was entitled to establish in such manner that his participation in the offenses charged was the product of coercion and compulsion. Such self-serving statements proffered by the defendant are not admissible. And, in a somewhat analogous situation this Court has held that the statements of unidentified persons do not qualify as *res gestae*. *United States* v. *Konovsky*, 7 Cir., 202 F. 2d 721, 728. Moreover, the record here is not such that the excluded testimony could have established a situation warranting a jury finding of coercion, compulsion or duress. There was nothing proved or proffered to show a compulsion "present, immediate and impending, and of such nature as to induce a well founded fear of death or at least serious bodily injury" accompanied by "no reasonable opportunity to escape the compulsion without committing the crime". *R. I. Recreation Center, Inc.* v. *Aetna Casualty & Surety Co.*, 1 Cir., 177 F. 2d 603, 605. See also *D'Aquino* v. *United States*, 9 Cir., 192 F. 2d 338, reh. den. 203 F. 2d 390.

Calzavara assails the instruction given by the court concerning compulsion or duress as a defense. But the claimed error was not urged in the trial court and is therefore deemed waived. *United States* v. *Furlong*, 7 Cir., 194 F. 2d 1, 3.

We have considered, but find without merit, Calzavara's contention that the court erred in failing to suppress evidence concerning the discovery of part of the stolen merchandise on the farm of his brother, Oscar Calzavara. The defendant had given information in this connection to FBI agents in Milwaukee following his grand jury appearance there. The court found, pursuant to a hearing, that the defendant was adequately and sufficiently informed of

his constitutional rights on that occasion. And, his belated contention, not urged below, that he furnished the information in exchange for a promise of lenity, may not be raised for the first time on appeal. *On Lee v. United States*, 343 U.S. 747, 749, 750, fn. 3; *United States v. Furlong*, 7 Cir., 194 F. 2d 1.

The judgment orders of the District Court are affirmed.

AFFIRMED

No. 14507.

SWYGERT, *Circuit Judge*, dissenting in part.

I must disagree with the majority's holding that the evidence was sufficient to sustain DiFronzo's conviction. An examination of the record shows a complete absence of evidence to support a verdict against this defendant either as an aider and abettor in the interstate transportation of stolen property or as a co-conspirator in such conduct.

The only evidence that might remotely relate DiFronzo to the violations of which he was found guilty is testimony to the effect that at one time he was seen riding in a Pontiac automobile which at a later time was found to be following the truck making the interstate transportation of the stolen goods. DiFronzo was not in the automobile at the time it was observed to be following the truck from Illinois to Wisconsin. Rather, he was found in another truck transporting stolen goods from one point in Illinois to another place in the same state. Moreover, there was no showing that DiFronzo owned the Pontiac or had any participation in its use interstate.

The Government has been unable to point to any evidence which might link DiFronzo with the interstate offenses charged. His actions tended to show a participation only in an intrastate transportation of stolen items. There is no evidence to show that he conspired in planning the interstate activity or that he aided and abetted in the conduct thereof. Although his activity might well warrant a conviction in a state criminal proceeding, it is not a proper basis for prosecution under the federal statutes. Accordingly, the evidence fails to sustain the verdict against this defendant.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II

In the

United States Court of Appeals

For the Seventh Circuit

Thursday, May 27, 1965

BEFORE:

HONORABLE LUTHER M. SWYGERT, *Circuit Judge*
HONORABLE JOHN S. HASTINGS, *Chief Judge*
HONORABLE LATHAM CASTLE, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* -vs- PETER DIFRONZO, MEDO CALZAVARA, ANTHONY DADDINO, *Defendants-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 14507-08	

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* * * * *

IT IS FURTHER ORDERED that the petitions for rehearing, filed by each of the defendants-appellants in these appeals, be and the same are hereby denied.

APPENDIX III

Sec. 371, Title 18, U. S. Code:

> "If two or more persons conspire . . . to commit any offense against the United States . . . and any one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Sec. 2314, Title 18, U. S. Code:

> "Whoever transports in interstate . . . commerce, any goods wares, merchandise . . . of the value of $5,000.00 or more knowing the same to have been stolen . . . shall be fined not more than $10,000.00 or imprisoned not more than 10 years or both."

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 25 1965
JOHN F. DAVIS, CLERK

No. 287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

MEDO CALZAVARA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinion from the Court below	2
Jurisdictional Statement	2
Questions presented for review	3
Statutes involved	4
Statement of the case	5
Reasons relied on for allowance of writ	13
I. The misuse of the grand jury and the wrongful reception of evidence	13
II. The exclusion of petitioner's testimony	18
III. The separation of the jury	19
Conclusion	21
Appendices:	
Appendix A—Opinion of the Court of Appeals	App. 1
Appendix B—Denial of petition for rehearing	App. 9
Appendix C—Trial court opinion, U. S. v. DeGrazia et al.	App.10
Appendix D—Statutes involved	App. 17

LIST OF AUTHORITIES CITED

Johnson v. U. S., 344 F.2d 163, 164-165	16
Jones v. U. S., 342 F.2d 863, 868, 873	16, 17
Lawn v. U. S., 355 U.S. 339, 348-350	15, 17
United States v. Carrier, 344 F.2d 42, 46	19
United States v. D'Antonio, 342 F.2d 667	19
United States v. Di Grazia, 213 F. Supp. 232	13, 14
Walder v. United States, 347 U.S. 62, 65	16

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VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Medo Calzavara, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on April 29, 1965.

JUDGMENT AND OPINION OF THE COURT BELOW

On April 29, 1965, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, Eastern Division, sentencing petitioner to concurrent terms of ten and five years imprisonment.

No opinion was rendered by the District Court incident to the entry of the judgment of conviction. However, an earlier related opinion relevant to the consideration of this petition appears at 215 Fed. Supp. 232, sub. nom. *U. S. v. DiGrazia*, and is reprinted as Appendix C hereto.

The Opinion of the Court of Appeals has not as yet been reported, but is reprinted herewith as Appendix A.

JURISDICTIONAL STATEMENT

On a jury trial, petitioner and others were convicted of unlawful interstate transportation of stolen merchandise, and of conspiracy so to do, in violation of Sections 2314 and 371, Title 18, United States Code.

On appeal to the United States Court of Appeals for the Seventh Circuit, the conviction was affirmed by an opinion filed April 29, 1965.

A petition for rehearing was timely filed and denied on May 27, 1965.

The jurisdiction of this Court is invoked under the provisions of Title 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where the rights of a criminal defendant have concededly been violated prior to trial by calling him as a witness before the grand jury and, without affording him assistance of counsel, the government obtained information and evidence from him in the course thereof without any admonition concerning his rights, then,

   A. May the evidence thus obtained be used against him for any purpose at his trial?

   B. If the indictment against him is quashed by reason of said invasion of his rights, may a new indictment be returned against him under the circumstances?

2. Where a defendant moves to suppress evidence on the grounds that it was unlawfully obtained through misuse of the grand jury, and where the testimony of the government officers resisting said petition demonstrates that the evidence was obtained by a promise of lenity to the defendant rather than by misuse of the grand jury, then, is the defendant precluded from relying upon the promise of lenity as grounds for the suppression?

3. Where a criminal defendant claims that his acts were performed under compulsion, can his testimony concerning such compulsion be excluded on the grounds that he is unable to identify the persons responsible for the threats against him?

4. May a jury be separated to return home in the midst of its verdict deliberations, and then return to complete its deliberations, over the objection of the defendant in a criminal case?

5. Where a decision of the Court of Appeals is predicated upon the converse of the facts shown of record, so that on a determinative point it is recited that a defendant agreed to a procedure when in fact he unequivocally objected, has said defendant thereby been denied due process of law by the reviewing court?

STATUTES INVOLVED

The relevant portions of the Statutes claimed to have been violated, are set forth within Appendix "D". The Statutes are:

A. Title 18 U.S. Code, Sec. 371.

B. Title 18 U.S. Code, Sec. 2314.

STATEMENT OF THE CASE.

Petitioner Medo Calzavara (hereinafter called defendant) was indicted in the Northern District of Illinois, Eastern Division in No. 63 CR 288 with co-defendants Anthony Francis Daddino, John J. Torello, and Peter DiFronzo, and charged with transporting goods in interstate commerce, knowing the same to have been stolen in violation of Section 2314 Title 18, United States Code, and for conspiracy to commit the act (A. 1-2).

After a jury finding of guilty, the court sentenced the defendant to a term of ten years on count 1 and five years on count 2, the sentences to run concurrent (A. 10). Motions for judgment of acquittal, in arrest of judgment and for a new trial were all denied (A. 10).

In a previous indictment returned in the Eastern District of Wisconsin in Milwaukee and transferred to the Northern District of Illinois on motion of some of the defendants and docketed in the Northern District of Illinois as No. 62 CR 16, the defendant was indicted with co-defendants Philip Joseph DiGrazia, Peter James Gushi, Anthony Francis Daddino, John J. Torello, Rose Calzavara and Peter DiFronzo. The allegations in 62 CR 16 were the same as that in 63 CR 288 from which conviction the defendant appeals. On Calzavara's motion to quash the indictment in 62 CR 16, the trial court held hearings; after which the trial court concluded that the defendant Calzavara had been called to testify as a witness in the Grand Jury proceedings in Milwaukee while he was a putative defendant without his being advised that evidence he gave might be used against him, and without his being advised of his right to have an attorney. The trial judge dismissed the

indictment No. 62 CR 16 as to both the instant defendant and his wife Rose Calzavara. *United States* v. *DiGrazia*, 213 F. Supp. 232.

Defendant's motion to suppress certain evidence as to him (A. 23), which evidence consisted of stolen merchandise found on his brother's farm where defendant took FBI agents after he was subpoenaed before the Milwaukee federal Grand Jury and after he was promised leniency, was denied (A. 29).

The Evidence for the Government

Unidentified robbers held up the night watchman and a maintenance man at the Certified Grocers Company in Forestview, Illinois and stole certain trailers containing cigarettes, razor blades and hosiery. The watchman, one Louis Kalousek, testified the robbers told him to be careful and not say anything, to keep his mouth shut (A. 14). The maintenance man, Hugh Norvell, testified that one of the robbers threatened him and told him not to remember anything (A. 14). The robbery occurred on April 29, 1961 at about 7:00 P.M. (A. 14).

FBI agents testified that commencing at 5:50 A.M. on April 30, 1961 (A. 14), they saw trailers pull into the Calzavara farm off Route 120 near Grayslake, Illinois. From that time until the early morning of May 2, 1961, automobiles and trucks were going in and out of the Calzavara property (A. 14-39). Some of the stolen property was found to have made its way into Wisconsin (A. 33); some of the property was taken back into the Chicago area (A. 37).

Evidence for Calzavara

Defendant Calzavara testified he lived in Grayslake, Illinois with his wife and ten year old son and went as far as the third grade. He then worked around horses for ten years and started a riding academy and then went into the farm and rodeo business in Libertyville, Illinois. He put on rodeos for county fairs (A. 43-44). He purchased the Grayslake Farm in 1958 and continued in the rodeo business; but in off seasons he hauled Christmas trees, hay and cattle in his trucks (A. 44). At the time of the indictment he maintained 125 to 130 head of stock including bulls, horses, steers and roping calves (A. 44).

He testified that on Sunday morning, April 30, 1961, he received a telephone call from a man who said he was a friend of Pete's (A. 44). (Government objection to the testimony was sustained when the court ascertained the defendant did not know the identity of the calling party. A. 44).

He then testified a truck came in about 2:30 A.M. on Sunday, April 30, 1961. He did not know who they were. (He was not permitted by the court to testify what they told him. A. 45). An hour or so later the men brought another trailer to the farm and put it in the barn. (The court sustained a government objection to what the driver said unless he could be identified. A. 45). A few minutes after the second trailer was brought in a Pontiac car arrived carrying five men, one of whom alighted and identified himself as "Brownie" (A. 45). (Government objection to what "Brownie" said to the witness was sustained. A. 45). The men were in and about the farm for about two and one-half hours, when four of them left, leaving one man behind (A. 45-46). His statement that he "was told never to go into the barn . . . " was objected to and the objection was sustained (A. 46).

Offer of Proof

Calzavara then made an offer of proof outside the presence of the jury. In that offer, Calzavara testified that he was called on the telephone on April 30 and was told by the person on the phone that "Pete" said that some one had told him he could go to the farm if he broke down. On the first arrival of the tractor, there were two men. One was left behind when the driver went after another trailer. After the tractor left, five men came on to the farm in a Pontiac. When they pulled in they made him turn out the yard light (A. 46-57). The court asked the defendant if he were taking orders from the men and Calzavara replied he was threatened; the minute the men came in they told him that if he did not do as he was told and keep the trucks there for two or three days, "that he had better learn to swim with cement boots on" (A. 47). He was told that several times later, including one time over the telephone after the trucks and the merchandise had been moved out (A. 47).

When the Pontiac arrived, the man who said his name was Brownie told the witness that as long as he was a good boy and behaved, nothing would happen to him (A. 47). When Brownie had this conversation with him, Brownie shook a gun at the witness (A. 48). At about 11:00 P.M. on Monday, May 1, some of the men told him they were going to take his tractor; he told them not to, but one of them said they were going to take his tractor whether he liked it or not and told him that "he had better behave if he knew what was good for him" (A. 48). He received a phone call later and was told the tractor was broken down and that it would be returned later; but that if it was not returned, that he should move the merchandise that the men had left behind in the barn "and to take care of himself, and to keep his mouth shut, because they knew where his child went to school" (A. 48).

On cross examination, Calzavara testified he could not recognize any of the seven men who came to his farm. The co-defendants in the courtroom could be the same men, but he could not know (A. 49). On further cross examination, he testified that when FBI agents McCormick and White visited him, they showed him such pictures, one of which was Government Exhibit B. He said that agent McCormick told him the man on the picture was the one posing as Brownie. For the Record, the prosecutor stated the picture was one of Peter Gushi (A. 49).

On further cross examination he testified that when he appeared before the Milwaukee Grand Jury he was shown many pictures but did not remember identifying Exhibit C, co-defendant Daddino's picture. Asked if he had not been asked certain questions and given certain answers before the Milwaukee Grand Jury, in which answers he had testified that a photograph shown to him was a photograph of one of the men who had come with the trailers, he testified he did not remember the questions and did not remember ever identifying anybody (A. 50). Asked by the prosecutor if he remembered telling the Grand Jury in Milwaukee that he was going to get $500 he replied that he was told after the Pontiac pulled in that if he was a good boy they would take care of him and give him $500 (A. 50-51).

He testified he did not tell the FBI that he had been threatened by the men when the FBI first talked to him; but he told the FBI about it later. He told the FBI that he and his family were threatened, but did not recall whether he told the FBI about the display of a weapon (A. 51).

Mr. Robert Bailey, the prosecutor, identified a picture shown to Calzavara before the Milwaukee Grand Jury as a picture of co-defendant Daddino and advised the court

the transcript stated that the picture was shown to Calzavara before the Grand Jury and Calzavara then said he could identify it (A. 52). Calzavara stated he remembered being shown many pictures before the Grand Jury, but did not remember identifying anyone (A. 52).

The court then ruled that Calzavara could not testify to conversations with unidentified persons because the rules of evidence required a basis for corroboration of conversations, which was the reason for the "dead man statute" because the dead man wasn't available to affirm or deny the conversation (A. 52).

The court told Calzavara he was not to testify before the jury to conversations with unknown persons (A. 52).

Evidence Resumed

In the presence of the jury, Calzavara testified the trucks were in the barn on his farm from Sunday morning until Tuesday morning during which period he only went far enough into the barn to feed the dog. He did not see any of the trailer contents until the trucks left, nor did he ever know the trucks' destination (A. 52-53).

A State Senator, Walter P. Hoffelder, a deputy chief of the Elgin Illinois Fire Department, Gerald Ahrens, a machine operator for the I.C. Railroad and a horse-owner Leroy Daily, a farm manager in Gurnee, Illinois, Richard Peterson, a Veronica Severs, a riding stable operator of Libertyville, Illinois, a Joseph Robinson and a farmer of Round Lake, Illinois Archie Rosing, all testified that Calzavara's reputation for truth and honesty was good (A. 58-59).

Government Evidence on Rebuttal

FBI agent White testified on rebuttal that he talked to Calzavara on May 12, 1961, and Calzavara described the features of some of the men who had come on to his farm, that they were wearing dark glasses, hats and gave a description as to approximate age and height (A. 61).

On cross examination agent White stated that Calzavara told him threats had been made and that Calzavara had been told, "You don't know nothing, and if anyone asks you anything, you better not say anything unless you can swim with your feet in cement." (A. 62).

Testimony on Defendant's Motion to Suppress the Evidence as to Him

Asst. U. S. Attorney Matthew Corry, of Milwaukee, testified Calzavara appeared in his office pursuant to a Grand Jury subpoena; that he did not give Calzavara any constitutional warning; and that he did not advise that Calzavara was entitled to have an attorney present. When Calzavara was temporarily excused by the Grand Jury, he was told to remain on the premises. Then FBI agents interrogated Calzavara and obtained information from him that he had transported $12,000 worth of cigarettes to his brother's farm. The government had no such knowledge before the interrogation (A. 23-24).

FBI Agent John Matthews testified he interrogated Calzavara in the office of the U. S. Attorney in Milwaukee when Calzavara appeared in response to a Grand Jury subpoena. Agent Matthews suggested that Calzavara was a "victim in this thing" (A. 25) and "we tried to make him believe he would be better off if he were cooperating

with the government" (A. 26). He further said Calzavara got the idea they would suggest leniency if he cooperated. And that the very fact that Calzavara told them was tantamount to cooperation (A. 26).

The Separation of the Jury

In the midst of its deliberations, the jury were directed to separate to their homes, then to return the next day to resume their deliberations. Petitioner objected to that procedure, but his objection was overruled. (Supplemental Appendix,[1] p. 7)

The opinion of the Court of Appeals states that Petitioner is "in no position to claim error in this connection" because his counsel "agreed to the procedure." The opinion is not supported by the record in that aspect.

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[1] In Calzavara's Reply Brief.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. The misuse of the grand jury and the wrongful reception of evidence.

Petitioner, enjoying the benefits of a third-grade education, was called before the Grand Jury investigating the offense here charged. He testified. The government contends that he was not then a putative defendant, and that no criminal action against him was contemplated until after his testimony.

In the course of his compulsory appearance before the Grand Jury, during a recess when he was under orders to remain, he was questioned by F.B.I. agents who determined from him that he had taken stolen merchandise to his brother's farm. The government did not previously possess this information (A. 23-24). The merchandise was recovered and introduced against Petitioner over his motion to suppress.

The circumstances of petitioner's appearance before the Grand Jury are discussed in *U.S.* v. *DeGrazia et al.*, 213 F. Supp. 232, Appendix C. Viewed in the light of the government testimony on the motion to suppress, the government contention that Petitioner was then just another witness has an exceptionally hollow ring. When petitioner appeared in response to the subpoena, he was interrogated by an F.B.I. agent who "tried to make him believe he would be better off if he were cooperating with the government." The agent also admitted that Petitioner then got the idea that the agents would suggest leniency if he cooperated; and Petitioner thereupon "cooperated". (A. 26)

The resulting indictment, of course, was dismissed. But it made no difference to the government for the procedure it adopted was simplicity itself. It merely obtained a new indictment, making the same charges against Petitioner a second time.

Petitioner moved to dismiss the new indictment. But this time the government was prepared. It filed the handy, stereotyped affidavit which, as the Court of Appeals notes, "unequivocally stated that no testimony was wrongfully, unlawfully or illegally obtained from Calzavara at any time." And this, according to the courts below, was conclusive—notwithstanding that the trial court had found, only a few months prior, that testimony had been wrongfully, unlawfully and illegally obtained from Calzavara.

In short, the government's *ex parte* and conclusory affidavit served effectively as a mandate to reverse the findings of the trial court.

The result is nonsense. Obviously, testimony was wrongfully obtained from Petitioner. The government might not have felt that its acts were wrongful, but the trial court reached the opposite conclusion from its original consideration of the matter (*U.S.* v. *DeGrazia*, Appendix C); and in theory, it is the opinion of the courts, rather than that of the government, which should be determinative in such a situation.

But the government disagreed with the trial court. Therefore, it was in a position to file a pleading, the second time around, stating that the prosecution had done nothing wrong. Thereupon, the matter was closed. The government's statement was regarded as conclusive, both in the trial court the second time and on appeal. By inference, both the trial court and the Court of Appeals have

held that the first time around, the trial court suffered from errors from which it was rescued by the timely statement by the government of a contrary conclusion.

This anomalous situation is said to be the consequence of your Honors' decision in *Lawn* v. *United States*, 355 U.S. 339, 348-350. *Lawn* might be viewed as justification of the result below, if the government had filed an affidavit that no evidence unlawfully produced through the appearance of petitioner before the first grand jury, had been used before the second grand jury. But that was not the case. The government did not deny that the illegal evidence had been *used* before the second grand jury. Rather, the government denied that any illegally obtained evidence *existed*. (A. 7) And the only reason that assertion did not constitute wilful perjury, was that it represented a conclusion rather than a statement of fact. Yet, it served to foreclose any inquiry by petitioner, and to immunize the government against the consequences of its abuse of the process of the first grand jury.

But it is in the realm of the use of the unlawful evidence at the trial, that all contact with logic becomes irretrievably lost. For at the trial, the government was permitted to make use of the very unlawfully obtained evidence which it had averred not to exist, and which the court had earlier determined to have been unlawfully obtained.

On cross examination on his offer of proof, the defendant was cross examined by the government extensively from the transcript of his grand jury appearance (A. 49-52). *Petitioner's* testimony was excluded in part because the government had unlawfully obtained evidence from petitioner! (A. 52).

Evidence unlawfully obtained, as was the transcript of petitioner's grand jury appearance, may no more be used for impeachment than in chief; for justice generally re-

quires that the defendant occupy the same position he would have held if his rights had been respected. *Walder* v. *United States,* 347 U.S. 62, 65; *Johnson* v. *United States,* D.C. Cir. 1964, 344 F. 2d 163, 164-165.

The Court of Appeals would justify the result below on the theory that the trial court found, in quashing petitioner's first indictment, "that no direct incriminating statements of fact were made by him." But that is completely immaterial to the issue. *Jones* v. *United States,* D.C. Cir. 1964, 342 F. 2d 863, 868. He may not have made a *confession* before the grand jury, but he certainly furnished evidence ultimately used against himself. And the Fifth Amendment forbids the extortion of all evidence, not merely confessions.

In the aspect of the admission of the physical evidence, the result is almost Rabelaisian. Petitioner moved to suppress the evidence on the grounds that it constituted the product of his compulsory appearance before the grand jury. Not so, replied the government: the evidence was obtained, not through abuse of the grand jury process, but through a promise of lenity. (A. 26) Therefore, the evidence was admitted. For it had been obtained, not when Petitioner was testifying, but during an interruption in his testimony during which he was told to remain and was there interrogated by the F.B.I. (A. 24). Therefore, in the view of the lower courts, the grand jury appearance had nothing to do with the obtaining of the information. And as to the promise of lenity, that doesn't count, for the defendant's motion had as its thrust the misuse of the compulsion of the grand jury process.

The whole thing has to be seen to be believed.

We do not contend that misuse of grand jury process immunized from prosecution the perpetrators of any offense then under consideration. Such a proposition would

be almost as illogical as those employed below to sustain Petitioner's conviction. But we do contend that where it has been demonstrated that an indictment is the product of wrongful compulsion of a defendant's testimony before a grand jury, the evidence thus obtained cannot be used before a subsequent grand jury. And certainly it cannot be used at the trial.

Lawn v. *United States, supra,* 355 U.S. 339, is completely inapposite to this situation. In *Lawn,* the government made no use before the second grand jury of the evidence illegally obtained before the first grand jury. In this case, the government proceeded on the theory that all of its evidence had been lawfully obtained: in effect, a second indictment was obtained on the theory that the evidence had been lawfully obtained in the course of the first grand jury proceedings. Obviously, in these circumstances, some sort of hearing was required, to assure that the second indictment was not the product of the procedures which had caused the first indictment to be quashed. *Jones* v. *United States,* D.C. Cir. 1964, 342 F. 2d 863, 873.

And in any event, *Lawn* specifically states that its holding is not to be deemed license for the use of such evidence at the trial, as was done here. 355 U.S. 350.

There is simply no logical theory on which the result below can be justified. It is blindingly clear that the evidence against Petitioner is the product of compelling his testimony before the grand jury, without admonition of any kind and without knowledge of his right to counsel. Petitioner's third-grade education and his lack of any prior contact with the courts, contributed to a situation in which the Fifth Amendment was rendered totally meaningless.

II. The exclusion of petitioner's testimony relative to compulsion.

Petitioner contended that his acts had been performed under compulsion and threats. But he was unable to identify the persons making the threats. For that reason, he was not permitted to offer the testimony (A. 52). The Court of Appeals affirmed because the statements were "self-serving".

It seems improbable that testimony of a criminal defendant can ever be excluded with propriety on the grounds that it is self-serving. All testimony of criminal defendants is self-serving in that sense. It is Hornbook law that exclusion of self-serving statements relates to declarations out of court, not subject to cross examination.

It is to be noted that the prosecution witnesses were permitted, on the government's direct examination, to testify to threats made by persons they could not identify (A. 14).

To forbid a defendant from testifying to threats against him, as was done here, may have the advantage of making convictions easier to obtain. But it also has the disadvantage of making convictions *too* easy to obtain. Every bank messenger who is robbed by an unidentified person, becomes an embezzler as a matter of law; for his lips are sealed when he is brought to trial.

The Court of Appeals goes farther, and states that petitioner's testimony could not establish compulsion as a matter of law. That argument overlooks the following propositions:

A. Petitioner was charged with *conspiracy*. On that theory, he was held accountable for the acts of others on a concept of vicarious liability. Obviously, if his participation was the product of

his fear in consequence of threats directed against him, he certainly cannot be said to have conspired with anyone, even if the threat would not be sufficiently immediate to excuse his personal felonies, if any.

B. Petitioner's child was constantly vulnerable to the threats of the unidentified men (A. 48). Not knowing who they were, petitioner had no reasonable chance to cause the apprehension of all of them. His fears for the safety of his child were quite reasonable.

C. The extent to which petitioner might reasonably have been motivated by the threats, was a jury question. Petitioner was given no chance to tell his story to the jury. To say that a jury would not have been "warranted" in finding coercion, is singularly easy when the jury has been prevented from hearing the evidence. And the jury's inquiry would have been whether petitioner's acts had been proven to be voluntary beyond reasonable doubt and not to make a "finding" of coercion. *United States* v. *Carrier*, 4 Cir. 1965, 344 F.2d 42, 46.

The fundamentals of due process are notice, opportunity to be heard, and a finding based on the record. Petitioner has been denied at least one, and probably two of these elements through being denied the opportunity to tell his story to the jury.

III. The separation of the jury during its deliberations.

In the Seventh Circuit, a jury may not properly separate to its homes during its deliberations, and then resume its deliberations, if the defendant objects to the separation. *United States* v. *D'Antonio*, 7 Cir., 1965, 342 F. 2d 667.

And that is precisely what was done in the trial below. (Supplemental Appendix,[2] p. 7)

The Court of Appeals' opinion states that Petitioner is barred from this assignment of error because his attorney consented to the separation of the jury. (Appendix A, p. 2)

There is no basis for such a holding. The record will show no such agreement. Defense counsel in fact objected, unequivocally, to the separation.

The record shows clearly that the trial court announced that it proposed to let the jurors deliberate until 10:30 P.M., then return to their homes and resume deliberations the next day. Defense counsel then spoke as follows:

> "I would have no objection, if your Honor please, if your Honor came back at 10:30, 10:40, whatever the hour might be, to then agreeing upon a sealed verdict which would be signed, sealed and delivered on Monday morning, but *I would have an objection to the jury separating.*"
>
> The Court: "This is standard practice, Mr. Callaghan and I am going to do it." (Supp. App.[3] 7, Supp. Tr. 7)

Most assuredly, this is not an agreement by petitioner, but an objection. And the ominous thing about the opinion of the Court of Appeals, in that aspect, is that the processes of this Court can easily be circumvented in any case by a misstatement of that nature.

In view of the holding in *D'Antonio*, there is no necessity for Petitioner to argue that it is error to permit the jury to separate during its deliberations over his objection.

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[2] In Calzavara's Reply Brief.

[3] In Calzavara's Reply Brief.

But Petitioner urges vigorously, that he has been denied due process in the Court of Appeals itself. As previously observed, one of the elements of due process is a determination based on the record. Petitioner certainly has not had that. Petitioner has instead been victimized by a flat misstatement of the record.

This contention is not made lightly. But Petitioner is entitled to due process on appeal, fully as much as at the trial. Whatever may have caused the Court of Appeals to state that petitioner agreed to the separation of the jury, constituted a force, influence and factor which denied such due process to petitioner.

Petitioner has pointed out this error by Petition for Rehearing in the Court of Appeals, but without effect. He prays that your Honors may hear him.

CONCLUSION.

Petitioner has been heard only at the will of the prosecution. He has furnished, under unlawful compulsion, the evidence which convicted him. He has been denied the right to make his explanation to the jury. And in the Court of Appeals itself, he has not been heard; the ascribing to him of an agreement that he never made, is ample demonstration of that.

If his right to be heard is ever to be respected, it must, we fear, be now. We pray that your Honors will grant certiorari.

Respectfully submitted,

GEORGE F. CALLAGHAN,
Attorney for Petitioner

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1964 — APRIL SESSION, 1965

No. 14507
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-vs-
PETER DIFRONZO and
MEDO CALZAVARA,
Defendants-Appellants.

No. 14508
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-vs-
ANTHONY DADDINO,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

April 29, 1965

Before HASTINGS, *Chief Judge,* CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge* — The defendants, Peter DiFronzo, Medo Calzavara, and Anthony Daddino, were convicted, after a jury trial, on both counts of a two-count indictment which charged the interstate transportation of

merchandise known to have been stolen, and conspiracy to so transport such merchandise, in violation of 18 U.S.C.A. § 2314 and § 371, respectively. Each was sentenced to a term of ten years on the substantive count and to a term of five years on the conspiracy count, the sentences to run concurrently.

Without reciting the evidence in detail it is sufficient for the purpose of the issues presented by the defendants' appeals to observe that the record reveals that on April 29, 1961, certain trailers containing a large quantity of cigarettes, razor blades, and hosiery were stolen from the premises of a grocery warehouse in Forest View, Illinois, and during the next few days there was concerted action on the part of the defendants in the transportation of the stolen merchandise. On the morning following the robbery the stolen merchandise was brought to the farm premises of the defendant Calzavara, near Grayslake, Illinois, and placed in a barn. Portions of the merchandise were thereafter transported to other locations, including one in Wisconsin.

On appeal all of the defendants contend the District Court erred in permitting the jury to separate after it had commenced its deliberation. But the record discloses that the trial court counsel for each of the defendants agreed to the procedure outlined and followed by the trial judge in this respect.[1] The defendants are in no position to claim error in this connection.

Defendants DiFronzo and Daddino urge that the trial court erred in overruling their respective motions for a severance. Such motions were made toward the conclusion of the trial after counsel for Calzavara during the cross

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[1] Moreover, there is no claim that the separation actually resulted in anything prejudicial to any of the defendants.

examination of a government witness elicited from the witness that Calzavara had told him that Calzavara's participation in the events involving the transportation of the stolen merchandise was produced by threats against his life by persons not identified. But the fact that a co-defendant states that his participation was caused by threats by a person or persons unknown and unidentified is not a basis for a severance. It evidences no demonstrable prejudice to any of the other co-defendants.

DiFronzo additionally urges that the evidence is insufficient to support his conviction on either count. From our examination of the record, and we must view the evidence and the reasonable inferences which may be drawn therefrom in the light most favorable to the government (*Glasser* v. *United States,* 315 U.S. 60, 80), we are satisfied that the evidence warrants the conclusion, implicit in the jury's verdict, that DiFronzo participated in both the substantive and the conspiratorial offenses.

Daddino makes the further contention that the court erred in declaring a mistrial and subsequently denying his plea in bar asserting former jeopardy. The trial commenced on September 12, 1963. On September 13, 1963, after three government witnesses had testified, and the fourth was on the stand, the noon recess was taken. An altercation took place between the prosecutor and counsel for one of the defendants. It involved the attempt of the prosecutor to regain possession of material tendered to defense counsel pursuant to a Section 3500[2] request. Eight of the jurors witnessed the episode. Defendant Calzavara moved for a mistrial based on the incident. The court interrogated the jurors, individually, *in camera.* Although the court's "ultimate impression" was that the episode

[2] 18 U. S. C. A. § 3500.

would not in fact influence the jurors he concluded that from the point of view of all concerned it would be better to proceed to try the case before another jury. Accordingly, he withdrew a juror and declared a mistrial. Daddino had not joined in the motion for a mistrial but he made no objection thereto. No inquiry was made as to the position of Daddino in the matter. The trial at which the convictions resulted commenced after Daddino's plea of former jeopardy was denied.

It is evident from the record that the concern of the trial judge was to secure for the defendants a fair trial before an impartial jury unaffected by whatever reaction, conscious or unconscious, the incident might have engendered in the minds of the jurors who witnessed it. The rationale of *Gori* v. *United States*, 367 U.S. 364, 368, is applicable here. It was there pointed out:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. *Simmons* v. *United States*, 142 U.S. 148; *Logan* v. *United States*, 144 U.S. 263; *Dreyer* v. *Illinois*, 187 U.S. 71, 85-86. It is also clear that 'This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served . . . ,' *Brock* v. *North Carolina*, 344 U.S. 424, 427, and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion."

The admonitions expressed in *Downum* v. *United States*, 372 U.S. 734, relied upon by the defendant, do not in our judgment serve to invalidate the teaching of *Gori*. See

United States v. *Tateo*, 377 U.S. 463, 467. We perceive no basis in the instant case upon which to attribute error to what appears to be an informed exercise of discretion on the part of the trial judge.

Calzavara contends that the District Court erred in not dismissing the indictment as to him on the grounds that it is identical to a prior indictment which was returned by a federal grand jury in Milwaukee, Wisconsin, but was dismissed on the ground that the defendant was not advised of certain of his constitutional rights before testifying, pursuant to subpoena, before that grand jury. The basis for the dismissal of the previous indictment is fully set forth in *United States* v. *DiGrazia* (D.C. N.D. Ill.) 213 F. Supp. 232, and it was there observed (p. 233) that:

> " . . . it is clear from an examination of his [Calzavara's] testimony . . . that no direct incriminating statements of fact were made by him."

The denial of the defendant Calzavara's motion to dismiss the subsequent indictment is supported by *Lawn* v. *United States*, 355 U.S. 339, 348-350, and *Costello* v. *United States*, 350 U.S. 359, 363. The government's response to the motion unequivocally stated that no testimony was wrongfully, unlawfully or illegally obtained from Calzavara at any time. Such an avowal is a sufficient basis for the denial of a motion to dismiss predicated upon alleged use of illegal testimony before the grand jury. *Lawn* v. *United States, supra.* And, the court cannot inquire into the sufficiency of the evidence actually presented. *Tinkoff* v. *United States*, 7 Cir., 86 F. 2d 868, 877.

Calzavara predicates error on the District Court's rulings sustaining objections to his testifying concerning the content of conversations in which persons unknown to and unidentifiable by the witness are alleged to have threat-

oned him with violence or death unless he participated in the acts about which he testified. He argues that he was entitled to establish in such manner that his participation in the offenses charged was the product of coercion and compulsion. Such self-serving statements proffered by the defendant are not admissible. And, in a somewhat analogous situation this Court has held that the statements of unidentified persons do not qualify as *res gestae*. *United States* v. *Konovsky*, 7 Cir., 202 F. 2d 721, 728. Moreover, the record here is not such that the excluded testimony could have established a situation warranting a jury finding of coercion, compulsion or duress. There was nothing proved or proffered to show a compulsion "present, immediate and impending, and of such nature as to induce a well founded fear of death or at least serious bodily injury" accompanied by "no reasonable opportunity to escape the compulsion without committing the crime". *R. I. Recreation Center, Inc.* v. *Aetna Casualty & Surety Co.*, 1 Cir., 177 F. 2d 603, 605. See also *D'Aquino* v. *United States*, 9 Cir., 192 F. 2d 338, reh. den. 203 F. 2d 390.

Calzavara assails the instruction given by the court concerning compulsion or duress as a defense. But the claimed error was not urged in the trial court and is therefore deemed waived. *United States* v. *Furlong*, 7 Cir., 194 F. 2d 1, 3.

We have considered, but find without merit, Calzavara's contention that the court erred in failing to suppress evidence concerning the discovery of part of the stolen merchandise on the farm of his brother, Oscar Calzavara. The defendant had given information in this connection to FBI agents in Milwaukee following his grand jury appearance there. The court found, pursuant to a hearing, that the defendant was adequately and sufficiently informed of

his constitutional rights on that occasion. And, his belated contention, not urged below, that he furnished the information in exchange for a promise of lenity, may not be raised for the first time on appeal. *On Lee* v. *United States*, 343 U.S. 747, 749, 750, fn. 3; *United States* v. *Furlong*, 7 Cir., 194 F. 2d 1.

The judgment orders of the District Court are affirmed.

AFFIRMED

No. 14507.

SWYGERT, *Circuit Judge*, dissenting in part.

I must disagree with the majority's holding that the evidence was sufficient to sustain DiFronzo's conviction. An examination of the record shows a complete absence of evidence to support a verdict against this defendant either as an aider and abettor in the interstate transportation of stolen property or as a co-conspirator in such conduct.

The only evidence that might remotely relate DiFronzo to the violations of which he was found guilty is testimony to the effect that at one time he was seen riding in a Pontiac automobile which at a later time was found to be following the truck making the interstate transportation of the stolen goods. DiFronzo was not in the automobile at the time it was observed to be following the truck from Illinois to Wisconsin. Rather, he was found in another truck transporting stolen goods from one point in Illinois to another place in the same state. Moreover, there was no showing that DiFronzo owned the Pontiac or had any participation in its use interstate.

The Government has been unable to point to any evidence which might link DiFronzo with the interstate offenses charged. His actions tended to show a participation only in an intrastate transportation of stolen items. There is no evidence to show that he conspired in planning the interstate activity or that he aided and abetted in the conduct thereof. Although his activity might well warrant a conviction in a state criminal proceeding, it is not a proper basis for prosecution under the federal statutes. Accordingly, the evidence fails to sustain the verdict against this defendant.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

Thursday, May 27, 1965

BEFORE:

HONORABLE LUTHER M. SWYGERT, *Circuit Judge*
HONORABLE JOHN S. HASTINGS, *Chief Judge*
HONORABLE LATHAM CASTLE, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* -vs- PETER DIFRONZO, MEDO CALZAVARA, ANTHONY DADDINO, *Defendants-Appellants.* Nos. 14507-08	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

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* * * * *

IT IS FURTHER ORDERED that the petitions for rehearing, filed by each of the defendants-appellants in these appeals, be and the same are hereby denied.

APPENDIX "C"

UNITED STATES of America,
Plaintiff,

-vs-

Phillip Joseph DiGRAZIA, Peter James Gushi, Anthony Francis Daddino, John J. Torello, Medo Calzavara, Rose Calzavara and Peter DiFronzo, *Defendants.*

No. 62 CR 16

United States District Court
N. D. Illinois, E. D.
Jan. 25, 1963

WILL, District Judge.

Defendants Rose and Medo Calzavara have moved to quash the indictment in the present cause as it relates to them. The motion is based on the alleged violation of certain asserted constitutional rights in connection with their separate appearances before a Federal Grand Jury in May, 1961.

At an oral hearing in this Court pursuant to the motion, testimony was taken of both Rose and Medo Calzavara and of the F.B.I. agents and Assistant U. S. Attorney Matthew M. Corry who participated in the investigation of the case and the presentment before the Grand Jury in Milwaukee, Wisconsin. The record of this hearing as well as the opposing briefs, the affidavits of the Calzavaras and the transcript of Medo Calzavara's Grand Jury appearance are now before the Court. They disclose the following relevant information.

Medo Calzavara was subpoenaed to appear before the Federal Grand Jury for the Eastern District of Wisconsin at Milwaukee on May 16, 1962, and did so appear and testify. The Grand Jury had been convened to consider charges arising under 18 U.S.C.A. § 2314 involving the alleged transportation in interstate commerce of certain stolen merchandise. Calzavara's testimony there related to this matter, although he was not then a named defendant. He was subsequently indicted, however, and charged with violating and conspiring to violate the foregoing statute. Rose Calzavara was also subpoenaed to appear before that panel on May 16, but she was not actually called to testify until May 26. At that time, acting on the advice of counsel, she repeatedly invoked her privilege against self-incrimination. She, too, was subsequently indicted and charged with violating and conspiring to violate 18 U.S.C.A. § 2314.

With respect to Medo Calzavara, at the time of his Grand Jury appearance he had not, as the Assistant U. S. Attorney knew, retained counsel. He was not advised of his right to consult counsel before testifying, nor was he advised either prior to or during that proceeding of his right not to answer any question which might tend to incriminate him or that anything he said might be used against him.[1] Accordingly, it is urged on his behalf that this failure to warn, at a time when he was allegedly earmarked as a "putative defendant", is sufficient, by itself, to vitiate the ensuing indictment. For its part, the Govern-

[1] Matthew Corry, the Assistant U. S. Attorney who conducted the interrogation of Medo Calzavara before the Grand Jury, testified at the oral hearing in this Court that he did not warn Calzavara of his privilege against self-incrimination because at the time of his Grand Jury appearance he consdered him a Government witness, not a prospective defendant although a possible one. Calzavara also testified that he was not warned, and the Grand Jury transcript evidences no warning.

ment argues that no such warning was required since Calzavara was called to testify as its witness, not as a defendant or prospective defendant, citing *United States v. Scully,* 2 Cir. 1955, 225 F. 2d 113, cert. denied 350 U.S. 897, 76 S. Ct. 156, 100 L. Ed. 788 (1955) and *United States* v. *Parker,* 7 Cir., 1957, 244 F. 2d 943, cert. denied 355 U.S. 836, 78 S. Ct. 61, 2 L. Ed. 2d 48 (1957). The Government further contends that it was not until after his Grand Jury testimony that information was uncovered which sufficiently linked him with the matter under investigation to warrant the return of an indictment as to him.

In their arguments, both sides make much of the appropriate label to be placed on Medo Calzavara at the time of his appearance before the Grand Jury — witness, possible defendant, prospective defendant, putative defendant, named defendant — as though the proper characterization would somehow provide a convenient solution to the problem which the motion raises. This analysis, while it may contribute to the solution, appears to miss the mark. The real question, it seems to me, ought to be whether, in the absence of a warning, Medo Calzavara may have tended to incriminate himself by his testimony before the Grand Jury. If so, the indictment must be quashed, for it would violate the constitutional precept embodied in the Fifth Amendment's privilege against self-incrimination, and all the Government's most self-serving characterizations of Calzavara's status could not save it in the face of this. Nor could it be saved by the subsequent discovery of independent information warranting his indictment.

This, of course, forces the Government to determine when a warning is appropriate. But, after all, it is not an unreasonable burden, especially since the U. S. Attorney or his assistant is in a good position to know what testimony can be expected. If the Government chooses to call

a witness before the Grand Jury who is or may be a defendant, its own self-interest as well as a proper regard for constitutional due process would seem to dictate the issuance of a warning and the securing of an immunity waiver. The risk it runs in failing to warn is a quashed indictment. In order to avoid this contingency, the fair and wise practice would seem to call for a warning and the securing of an immunity waiver whenever it is even remotely possible that the testimony of a witness might tend to incriminate him. See *United States* v. *Scully, supra.*

Turning then to Calzavara's Grand Jury appearance, it is clear from an examination of his testimony there that no direct incriminating statements of fact were made by him. He was treated as a witness who had information of events about which the Government was desirous of apprising the Grand Jury, and the questions by the Assistant U. S. Attorney and Calzavara's answers thereto followed this tack. It is apparent from the transcript that the Assistant U. S. Attorney did not get the kind of answers he wanted. Indeed, at the oral hearing in this Court, Calzavara stated that after his Grand Jury appearance " • • • Mr. Corry got awful mad at me. He says, 'How long did it take you to think up that cute story you told the Grand Jury?' And I said, 'What do you mean? Ask Mr. McCormick (F.B.I. agent) if that isn't the truth.' "

[1] While an examination of Medo Calzavara's Grand Jury testimony reveals no direct incriminating statement, there is no way to know whether in fact his appearance was incriminating in the minds of some or all the members of the Grand Jury. Certainly on the record before me, I cannot say that his testimony might not have tended to incriminate him. The only portion of the Grand Jury proceedings for which a transcript is available is Calzavara's testimony. What the U. S. Attorney or Assistant U. S. Attorney said to the Grand Jury subsequently concerning

this testimony, what incriminating inferences they drew from it, how they characterized it as to truth or accuracy, etc. are all unknown.

Whether constitutional rights have been respected should not be the subject of speculation. Where, as here, there is doubt, the only proper action is to dismiss the indictment.

While the foregoing disposes of Medo Calzavara's motion, there is inherent in this situation a broad general question which merits further consideration. In this particular case, a Grand Jury transcript is available only with respect to the testimony of one witness. I understand that the practice varies from district to district and even within districts, but that in many districts the usual procedure is not to make a stenographic record, much less to transcribe the testimony, of most witnesses before the Grand Jury. In view of the importance of the Grand Jury proceedings and the several circumstances in which reference thereto is necessary, the failure to make at least a stenographic record which can be transcribed, if needed, seems most unfortunate and obviously creates opportunity for mischief.

Moreover, even where there is a transcript of the testimony before the Grand Jury, it may, as in this case, be difficult or impossible to determine whether that testimony was self-incriminating. Under all the circumstances, it would seem desirable to establish the rule that, except as to perjury indictments arising out of testimony before the Grand Jury, no individual who is not warned of his privilege against self-incrimination and executes a formal immunity waiver either upon advice of counsel or after declining such advice, may subsequently be indicted for an offense about which he was questioned before the Grand Jury. This rule would impose no greater burden on the Government than the Constitution and the law contem-

plate. It would merely regularize what is at present a loose and haphazard procedure.

With respect to Rose Calzavara, it is conceded that she gave no incriminating testimony before the Grand Jury. She contends, however, that the Assistant U. S. Attorney, by the form and manner of his questioning, prejudiced her in the eyes of that panel, thereby inducing the return of the indictment.

[2] As previously indicated, there is no transcript of Rose Calzavara's testimony. She avers that after the Assistant U. S. Attorney had been advised of her intention to rely on her Constitutional privilege and not to testify, he nevertheless brought her before the Grand Jury and asked her certain questions, including the following:

"Q. Are you married?
"Q. To whom are you married?
"Q. You have a son, don't you?
"Q. Do you love your son?
"Q. Why are you ashamed to answer questions about your son?
"Q. Who is the father of your child?
"Q. What right have you to refuse my questions? I'll bring you before the Judge and require you to answer my questions.
"Q. What is the Fifth Amendment? Do you know what it means?
"Q. Are you an American citizen?"

The Assistant U. S. Attorney testified in this Court that he remembered asking some of the foregoing questions, did not remember asking all of them, but conceded that he might have asked them. While some of these questions are not prejudicial and might properly be asked in testing the validity of the witness' reliance on her constitutional privilege, others are clearly prejudicial and could only

be calculated to discredit and impugn her in the eyes of the jurors.

Again, as in the case of Medo, there is no way of knowing on what basis the Grand Jury returned the indictment against Rose Calzavara. In fact, absent any record of the proceedings, there is no way to ascertain accurately whether any other evidence at all involving her was presented. But even assuming the presentation of other evidence which, in itself, would have warranted the indictment, it must necessarily be pure speculation as to whether that evidence or the prejudicial conduct of the prosecutor or both prompted the Grand Jury's action.

[3] The Grand Jury exists as an integral part of Anglo-American jurisprudence for the express purpose of assuring that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the government or private persons. *United States* v. *Wells,* D.C.D. Idaho 1908, 163 F. 313, 324. In this regard, it is well to remember Mr. Justice Brandeis' admonition that "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States,* 277 U.S. 438, 479, 48 S. Ct. 564, 572, 72 L. Ed. 944 (1928) (dissenting opinion). It is the duty of a prosecutor presenting a case to a Grand Jury not to inflame or otherwise improperly influence the jurors against any person. Even the presence of the prosecutor while the jurors are deliberating their action, though he say nothing, may be grounds for quashing the indictment. *United States* v. *Wells, supra.*

These principles are so well grounded in our jurisprudence as not to require elaboration. Their application here leaves me no alternative but to dismiss the indictment against Rose Calzavara as well.

Accordingly, the indictment as to both Rose and Medo Calzavara is dismissed.

APPENDIX "D"

Sec. 371, Title 18, U. S. Code:

"If two or more persons conspire . . . to commit any offense against the United States . . . and any one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Sec. 2314, Title 18, U. S. Code:

"Whoever transports in interstate . . . commerce, any goods wares, merchandise . . . of the value of $5,000.00 or more knowing the same to have been stolen . . . shall be fined not more than $10,000.00 or imprisoned not more than 10 years or both."

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	4
Conclusion	17

CITATIONS

Cases:

Brown v. *United States*, 99 F. 2d 131, certiorari denied, 305 U.S. 562	10
Brown v. *United States*, 356 U.S. 148	15
Coppedge v. *United States*, 272 F. 2d 504, certiorari denied, 368 U.S. 855	9
Holt v. *United States*, 218 U.S. 245	10
Iva Ikuko Toguri D'Aquino v. *United States*, 192 F. 2d 338, certiorari denied, 343 U.S. 935	15
Kleven v. *United States*, 240 F. 2d 270	10
Lawn v. *United States*, 355 U.S. 339	12
Lucas v. *United States*, 275 Fed. 405, certiorari denied, 258 U.S. 620	10
R. I. Recreation Center v. *Aetna Casualty & Surety Co.*, 177 F. 2d 603	15
Shannon v. *United States*, 76 F. 2d 490	16
United States v. *D'Antonio*, 342 F. 2d 667	5,9,10
United States v. *DiGrazia*, 213 F. Supp. 232	11
Walder v. *United States*, 347 U.S. 62	16
Wheeler v. *United States*, 165 F. 2d 225, certiorari denied, 333 U.S. 829	10
Wigington v. *United States*, 296 Fed. 125, certiorari denied, 264 U.S. 596	16

785-760—65——1

Statutes:

	Page
18 U.S.C. 317	3
18 U.S.C. 2314	3

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 286

PETER DIFRONZO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 287

MEDO CALZAVARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 286, App. I, Pet. 287, App. A) is reported at 345 F. 2d 383.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1965. Petitions for rehearing were denied on May 27, 1965. The petitions for writs of certiorari were filed on June 25, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Both petitioners raise the common issue whether it was error for the trial court to permit the jury to go home for the night while they were in the midst of their deliberations.

In addition, the following issues are raised in No. 287:

2. Whether the indictment should have been dismissed as to petitioner Calzavara.

3. Whether petitioner Calzavara's motion to suppress certain evidence was properly overruled.

4. Whether the trial court abused its discretion in refusing to permit petitioner Calzavara to testify concerning alleged threatening statements made to him by unidentified and unknown persons.

5. Whether petitioner Calzavara's testimony at a prior grand jury hearing was properly used in cross examination to impeach him.

In No. 286, the following additional issue is raised.

6. Whether the evidence was sufficient to support the conviction of petitioner DiFronzo.

STATEMENT

Petitioners, together with co-defendant Anthony Daddino, were convicted by a jury in the United States District Court for the Northern District of

Illinois on both counts of a two-count indictment charging knowing transportation of stolen goods in interstate commerce and conspiracy in violation of 18 U.S.C. 2314 and 317 (J.A. 1–2).[1] Each petitioner was sentenced to imprisonment for ten years on the substantive count and five years on the conspiracy count, to run concurrently (J.A. 10). The court of appeals affirmed the convictions, one judge dissenting as to petitioner DiFronzo on the ground that the evidence was insufficient to support his conviction (Pet. 287, App. A).

The evidence may be summarized as follows:

On April 29, 1961, three unidentified men robbed a Certified Grocery warehouse in Forest View, Illinois, taking large quantities of various types of merchandise valued at $161,716.00 (J.A. 14, 41–42). Shortly after the robbery, agents of the F.B.I. had petitioner Calzavara's farm near Grayslake, Illinois, under surveillance. During the early morning hours of April 30, 1961, two large tractor-trailer units and a 1961 Pontiac arrived at the farm (J.A. 14–15, 44–47, 53–54). About 8:00 p.m. on May 1, 1961, petitioner DiFronzo took the 1961 Pontiac to a rendezvous with a tractor-trailer unit rented earlier that day by co-defendant Daddino in Chicago and followed it back to the Calzavara farm (J.A. 15, 19, 32–33, 36, 38). About 11:53 p.m. co-defendant Daddino departed from the Calzavara farm driving a

[1] The jury failed to agree on a verdict as to co-defendant John Torello and the court granted his motion for a judgment of acquittal (J.A. 10).

tractor-trailer unit containing about $70,000 worth of stolen merchandise and proceeded into Wisconsin (J.A. 19–21, 30–32, 33–36, 41–42).[2] Twenty minutes after the truck left, three men left the farm in the 1961 Pontiac proceeding in the same direction as the truck (J.A. 16, 36). Just south of Union Grove, Wisconsin, the 1961 Pontiac passed the F.B.I. vehicle and moved in behind the truck, followed for a while and then passed at a high rate of speed (J.A. 20, 30). A short time later, the tractor-trailer was abandoned at a truck stop in Wisconsin and Daddino hitch-hiked back to Chicago (J.A. 30–32).

Some time after 2:00 a.m., May 2, 1961, petitioner Calzavara received a telephone call. Thereafter, he transferred stolen merchandise worth about $14,000 to the farm of his brother, Oscar Calzavara (J.A. 17, 40–41, 55).

The 1961 Pontiac returned some time before 5:19 a.m. It was occupied by three men, one of whom got out and departed in the remaining truck (J.A. 17, 55). F.B.I. agents followed the truck to Stone Park, Illinois and arrested petitioner DiFronzo as he abandoned it and ran (J.A. 18, 34–35, 37, 39). The truck contained $70,000 worth of stolen merchandise (J.A. 41–42).

ARGUMENT

1. Both petitioners complain that it was reversible error for the trial court, over defense counsel's objection, to permit the jury to return to their homes

[2] The trailer was being pulled by a tractor owned by petitioner Calzavara (J.A. 19–20, 30, 35–36, 54). Calzavara reported the tractor stolen on May 2, 1961 (J.A. 39–40).

for the night, citing *United States* v. *D'Antonio*, 342 F. 2d 667 (C.A. 7) (Pet. 286, pp. 14–17; Pet. 287, pp. 19–21). The record shows that the case progressed to the point of submission to the jury late on a Friday afternoon. At about 6:00 p.m. the trial judge had a conference with counsel to settle the procedure for obtaining the verdict. (The judge had a private engagement until late that evening and was to be out of town all day Saturday and Sunday). At this conference, it was agreed that the jury would deliberate until 10:30 p.m. that evening, at which time the court would reconvene to open sealed verdicts if agreement had been reached as to all four defendants in the interim (Gov't Supp. Br. App. 1a–5a). In the event the jury could not agree as to all defendants by that time, the court proposed to "instruct [the jury] as to their duties and let them return to their homes to resume their deliberations" the next morning (Gov't Supp. Br. App. 2a).[3] During this discussion, the following exchange took place between Mr. Callaghan, trial counsel for petitioner DiFronzo, and the court (Gov't Supp. Br. App. 5a):

> Mr. CALLAGHAN. I would have no objection, if your Honor please, if your Honor came back at ten-thirty, ten-forty, whatever the hour

[3] Subject to approval of counsel when court reconvened that night (Gov't Supp. Br. App. 3a), it was proposed that verdicts reached on Saturday would be sealed and opened Monday morning. Counsel agreed to waive polling of the jury so that it could be discharged upon termination of its deliberations (Gov't Supp. Br. App. 4a, 11a).

might be, to then agreeing upon a sealed verdict which would be signed, sealed and delivered on Monday morning, but I would have an objection to the jury separating.

The COURT. This is standard practice, Mr. Callaghan, and I am going to do it. The only cases in which we now lock up the jury are cases in which we have reason to believe that between ten-thirty or eleven o'clock at night when they are going to leave here and nine-thirty the next morning something may happen to interfere with the purity of their deliberations. I see nothing in this case which would lead me to believe that anybody is going to tamper with this jury on either side between the late hour that they will get out of here, assuming that they don't arrive at a verdict tonight, and the early hour tomorrow at which time they resume their deliberations.

Thereafter the court recessed to reconvene at 11:05 p.m. to assess the situation in light of the jury's evening deliberations. Upon reconvening, the court outlined the procedure proposed as follows (Gov't Supp. Br. App. 6a–7a):

The COURT. Gentlemen, it is my intention to ask the jury to join us and to make the following inquiries of the foreman:

First, to inquire as to whether or not the jury has arrived at verdicts with respect to any of the defendants; and thereafter, to ascertain, depending on what their answer is, whether they believe that they are reasonably close to verdicts with respect to any or all of the defendants.

If he advises me that they are not, I will then admonish them with respect to their conduct and excuse them until nine-thirty tomorrow morning. If he advises me that they are, I will inquire whether, in his opinion, they may be able to reach a verdict within the next 30 minutes, in which event I will permit them to resume their deliberations for that period of time, Then if they have not reached a verdict, we will excuse them until tomorrow morning—make it ten o'clock instead of nine-thirty, so the length of time will be the same. Is there any objection to that procedure?

Mr. CALLAGHAN. May I have one moment?

The COURT. Surely.

Mr. CALLAGHAN. Well, I don't need a conference as to part of the Court's suggestion. I object to any suggestion that the Court might make as to whether or not they might reach a verdict in 30 minutes, lest some juror capitulate on the basis that if we reach a verdict within 30 minutes, we will be permitted to go home.

The COURT. Then I won't ask them with respect to 30 minutes, but I will follow the same procedure. I will let them deliberate another 30 minutes, and if they have not reached a verdict then—this is assuming that they tell me that they believe they are reasonably close to a verdict.

Mr. CALLAGHAN. I think it would be a bad idea to state a certain time.

The COURT. All right. I am not sure that it presents any problem, but if you think it presents any problem, I will bend over backwards to obviate it.

When the jury was brought in, the foreman informed the court that, although they had agreed on verdicts as to some of the defendants, he did not believe they could agree as to the others that night. The court then instructed the jurors concerning their conduct overnight and separated them to their homes without further objection by defense counsel (Gov't Supp. Br. App. 9a–11a). After the jury had retired, the court confirmed counsel's agreement to waiving the polling of the jury and receipt of sealed verdicts to be opened on Monday morning (Gov't Supp. Br. App. 11a).

Since petitioner Calzavara raised no objection to the separation of the jury and agreed with the procedure proposed by the court,[4] he has no standing to complain now. Counsel for petitioner DiFronzo did object to separation of the jury at the early evening session and the record does not show that this objection was expressly withdrawn. We believe implied agreement can reasonably be inferred from the final Friday night session in which the court again outlined the procedure it intended to follow and expressly solicited objections thereto (Gov't Supp. Br. App. 6a). Mr. Callaghan objected to part of the procedure but did not renew his objection to separation of the jury. Nor was the objection renewed when the court instructed the jury and permitted them to proceed to

[4] The objection noted was registered by Mr. Callaghan, trial counsel for petitioner DiFronzo. Mr. Callaghan now represents petitioner Calzavara on appeal. We find nothing in the record suggesting that objection by one counsel would be treated as objection by all in informal conference with the court outside the presence of the jury.

their homes for the night. Further indication that counsel did not consider the point important is the fact that the issue was raised belatedly by supplemental brief in the court of appeals only after the Seventh Circuit decision in *United States* v. *D'Antonio*, 342 F. 2d 667. Petitioners have never suggested that they suffered any prejudice by the separation.

In these circumstances, even assuming (contrary to the finding below) that there was no agreement to jury separation, we believe that petitioners' reliance on *D'Antonio* is unwarranted. We read *D'Antonio* as resulting from a combination of circumstances not present in the instant case. There, in addition to objection to jury separation, the trial court failed to give a cautionary instruction[5] and improperly permitted off-the-record communications between the United States Marshal and the jury. Objections were promptly pursued on appeal. In the instant case, however, no improper contacts were made with the jury and the court gave a lengthy cautionary instruction and received the jury's affirmative assurances that they would keep their confidences (Gov't Supp. Br. App. 9a–10a).

Putting the *D'Antonio* decision to one side, it has long been the federal rule that separation of the jury is within the sound discretion of the trial court and

[5] Failure to caution the jury prior to separation has been held to be in itself sufficient for reversal. See, *e.g.*, *Coppedge* v. *United States*, 272 F. 2d 504 (C.A.D.C.), certiorari denied, 368 U.S. 855.

that review will not be accorded unless prejudice affirmatively appears. See, *e.g.*, *Holt* v. *United States*, 218 U.S. 245; *Wheeler* v. *United States*, 165 F. 2d 225, 229 (C.A.D.C.), certiorari denied, 333 U.S. 829; *Kleven* v. *United States*, 240 F. 2d 270, 273 n. 1 (C.A. 8); *Brown* v. *United States*, 99 F. 2d 131 (C.A.D.C.), certiorari denied, 305 U.S. 562; *Lucas* v. *United States*, 275 Fed. 405, 407 (C.A. 8), certiorari denied, 258 U.S. 620. The fact that *D'Antonio* went to such lengths to distinguish many of these cases suggests the importance of the peculiar fact situation to that decision. Whether or not *D'Antonio* was correctly decided, there is no occasion for this Court to review the holding of the Seventh Circuit in the instant case; on its facts, it is fully in accord with settled law.

2. Petitioner Calzavara contends that his prior testimony at a grand jury investigation should result in dismissal of the present indictment returned by another grand jury. He also claims that it should have precluded use of certain evidence at trial. At a hearing on a motion to suppress, it was shown that he appeared, pursuant to a grand jury subpoena, before the Grand Jury of the United States District Court at Milwaukee, Wisconsin on May 16, 1961 without having been warned of his constitutional rights (J.A. 23). Shortly thereafter, he was interviewed by F.B.I. agents who told him that he did not have to say anything, that he was entitled to an attorney and that whatever he said could be used against him in court (J.A. 25). The agents specifically told him that "we couldn't promise him any-

thing" (J.A. 26). At this interview, petitioner told the agents he had transported about $12,000 worth of the stolen merchandise to his brother's farm (J.A. 24–27). Thereafter, the Wisconsin grand jury returned an indictment charging petitioner with interstate transportation of stolen goods and conspiracy. That indictment was dismissed because it was returned by a grand jury before which petitioner had testified without being advised of his right to have counsel and to remain silent. *United States* v. *DiGrazia*, 213 F. Supp. 232 (N.D. Ill.) (Pet. No. 287, App. C., p. 10). The court there, while noting that petitioner had made "no direct incriminating statement" of fact, stated that it could not know whether "in fact his appearance was incriminating in the minds of some or all the members of the Grand Jury" and accordingly gave petitioner the benefit of the doubt. (213 F. Supp. at p. 234; Pet. 287, App. C, pp. 13–14). Subsequently, the present indictment charging petitioner with the same offenses was returned by a Grand Jury for the Northern District of Illinois without benefit of petitioner's appearance.

a. Petitioner's assertion that the present indictment should have been dismissed (Pet. 287, pp. 13–17) is without merit. He did not testify before the second grand jury and it is conceded that he does not know whether his prior testimony was used in any manner before the subsequent Illinois grand jury.* The in-

*We have been informed by the United States Attorney's Office that only FBI agent testimony was presented to the second grand jury.

stant case clearly falls within the established rule that mere suspicion that illegally obtained evidence was presented to the grand jury is insufficient to prevent a trial on the merits. *Lawn* v. *United States*, 355 U.S. 339, 348–349.

b. Petitioner Calzavara also contends that the stolen merchandise recovered as a result of the FBI interview with petitioner shortly after his Wisconsin grand jury appearance should have been suppressed because it was a product of his compelled appearance and a governmental promise of leniency (Pet. 287, pp. 16–17). The trial court, after the hearing (*supra*), properly declined to suppress the evidence, finding that it was obtained after petitioner's appearance and after he had been fully informed of his constitutional rights by the FBI agents. The asserted "promise of lenity" as a ground for suppression was raised for the first time on appeal and properly rejected as coming too late (Pet. 287, App. A, pp. 6–7). In addition, it affirmatively appears that petitioner was informed that the FBI agents could not promise him anything.

3. Petitioner Calzavara contends that he should have been permitted to testify to conversations with unidentified persons in support of his claim of coercion (Pet. 287, pp. 18–19). The trial judge was confronted with this problem for the first time when petitioner attempted to testify about the contents of a telephone call he received prior to the movement of the stolen goods onto his property (J.A. 44). Objection was sustained when questioning showed petitioner did not

know the identity of the calling party. The issue came up again later when petitioner tried to testify to conversations with the unidentified drivers of the trucks who first brought the stolen goods to the farm and objection was sustained (J.A. 45). Finally, the court refused to permit testimony about conversations with unidentified men who arrived at the farm in a Pontiac automobile shortly after the stolen goods arrived (J.A. 45–46); however, at this point the question was reserved for further consideration at the next session of court (J.A. 46). At the next session of court, petitioner made an offer of proof to the effect that on the morning following the robbery five men came to his farm in a Pontiac and told him "if he did not do as he was told * * * that he had better learn to swim with cement boots on" (J.A. 47); that one of the men, who said his name was Brownie, shook a gun at him and told him that "as long as he was a good boy and behaved nothing would happen to him" (J.A. 47–48); and that he was "to keep his mouth shut, because they knew where his child went to school" (J.A. 48). These threats were allegedly repeated several times over the three day period after the stolen goods were brought to petitioner's farm (J.A. 47–48). Petitioner stated he could not identify the men who threatened him and had not identified them in the past (J.A. 49–52). The government, on cross-examination of petitioner on his offer of proof, brought out without objection that he had identified co-defendant Daddino before the first grand jury (J.A. 50–52). The trial court

excluded the offer of proof, stating in part that (summarized at J.A. 52):

> The laws of evidence require some basis for corroboration of conversations. That is the reason for the Dead Man's Statute, we don't permit people to talk about conversations with dead men, because the dead man isn't available to confirm or deny the conversation that was made.
>
> Similarly, we don't permit telephone conversations to be testified to, unless there is an identification, and a reasonable identification, of the person on the other end.
>
> Certainly we don't permit face-to-face conversations to be testified to when the witness insists he hasn't any idea who the person with whom he was speaking was or is, and cannot possibly identify, has no suggestion as to who the other party to the conversation was. If we did that, we would permit self-serving conversations to be received under all circumstances.

a. Contrary to petitioner's contention that the alleged threats were erroneously excluded on the ground that they were "self-serving" (Pet. 287, p. 18), the express ground for exclusion was petitioner's failure to identify the speakers. In the circumstances presented, we believe exclusion on that ground was within the discretion of the trial court. The men involved in the trans-shipment of the stolen goods were present on petitioner's farm for a period of about three days. His contacts with them included face-to-face confrontation and telephone conversations (J.A. 15, 44–56). Petitioner had an unusually long opportunity to ob-

serve the men who allegedly threatened him, yet steadfastly maintained he could not provide any clue as to their identity.[7] Apparently the court considered petitioner's professed inability to give any identification whatever tantamount to a deliberate refusal to testify as to highly relevant matters which he was bound to know, for the deliberate purpose of precluding meaningful cross-examination. Cf., *Brown* v. *United States,* 356 U.S. 148.

Moreover, petitioner's own testimony established the absence of at least one of the essential elements necessary to constitute a defense of compulsion, namely, a present, immediate, impending and continuing danger with no reasonable opportunity to escape the compulsion without committing the crime. *Iva Ikuko Toguri D'Aquino* v. *United States,* 192 F. 2d 338 (C.A. 9), certiorari denied, 343 U.S. 935; *R. I. Recreation Center* v. *Aetna Casualty & Surety Co.,* 177 F. 2d 603 (C.A. 1);

[7] Petitioner also testified that he did not see any of the seven individuals who came to his farm in the courtroom (his co-defendants on trial were Torello, Daddino and DiFronzo). He said they could be the same men, but he did not remember them as being the same (J.A. 49). He denied having previously identified pictures of "Brownie" or any of the other men (J.A. 49). An F.B.I. agent later testified, as part of government rebuttal, that he had interviewed petitioner on May 12, 1961, and petitioner had said one of the men in the Pontiac was 35 to 38 years old, 5′8″ to 5′10″ tall, with brown curly hair and pleasant features; that another man driving a tractor was a small Sicilian about 35 years old wearing a cap and brown trousers; and that another man was a tall dark man 30 to 35 years old wearing dark glasses, a hat, and carrying a transistor radio (J.A. 61). The descriptions apparently fit petitioner's three co-defendants (J.A. 62).

Shannon v. *United States*, 76 F. 2d 490, 493 (C.A. 10). Petitioner's own statements in the offer of proof show that he and his wife were free to come and go from the farm whenever they pleased and, at times, were left at the farm alone (J.A. 45–46, 48, 54–55). Where a matter as to which a defendant offers testimony does not constitute a legal defense, there can be no error in refusing to allow the offer. *Wigington* v. *United States*, 296 Fed. 125 (C.A. 4), certiorari denied, 264 U.S. 596. Here the court did not disallow all of petitioner's efforts to persuade the jury that he was acting under compulsion; it submitted petitioner's plea of compulsion to the jury under instructions to which no exception was taken (Calzavara Br. Supp. App. 1). The court drew the line only when it was persuaded that petitioner was attempting to achieve the benefit of relating alleged conversations with allegedly unknown persons without exposing himself to examination which would lead to their identification.

b. Petitioner Calzavara's further assertion that the government made erroneous use of his grand jury testimony at trial (Pet. 287, p. 15) is without merit. Use of the prior grand jury testimony (without objection in the district court) to impeach petitioner in a hearing outside the presence of the jury was proper. See *Walder* v. *United States*, 347 U.S. 62.

4. The statement of facts refutes petitioner DiFronzo's contention that the evidence was insufficient to support his conviction (Pet. No. 286, pp. 9–14). DiFronzo drove the 1961 Pontiac to a rendezvous with a truck rented in Chicago by co-defendant Dad-

dino and followed it back to the Calzavara farm. Three persons used this same automobile to follow a truck (which was driven by Daddino) carrying stolen merchandise into Wisconsin. This car returned to the farm the following morning with three persons in it. One of these persons got out of the car and drove the remaining truck with stolen merchandise aboard to an Illinois town and abandoned it. This person was identified as petitioner DiFronzo. The dissenting judge's observation that DiFronzo was in another truck transporting stolen goods from one point in Illinois to another place in the same State at the time the Pontiac was following the Wisconsin-bound truck rests on a mistaken view of the record. The majority of the court of appeals correctly viewed the evidence as warranting the conclusion that petitioner DiFronzo participated in both the substantive offenses and the conspiracy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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No. 287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

MEDO CALZAVARA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF FOR PETITIONER

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INDEX

	PAGE
1. The separation of the jury.	2
2. The improper use of the grand jury.	3
3. The evidence of coercion.	4
Conclusion	5

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REPLY BRIEF FOR PETITIONER

May it please the Court:

Detailed refutation of the government's contentions would require a brief of inappropriate length. We will refute the government's generalities with neither tedious details nor unenlightening generalities of our own. Rather, we will demonstrate that the government has proceeded from inapposite premises.

As we read the government's brief, it is not contended that the questions we have presented are inappropriate for this court's consideration. Rather; the government contends that the points are not properly preserved for review.

The government is quite mistaken.

1. The separation of the jury.

The government contends that this petitioner did not object to the jury separation. It is conceded that the objection was made on behalf of a co-defendant; but the government claims to "find nothing in the record suggesting that objection by one counsel would be treated as objection by all." (Br. 8).

But the record fairly screams that throughout the trial objection by one defendant was treated as objection by all. At the conclusion of the government's case, when defense motions were in order, the court stated: "All right, gentlemen. I take it any motions made by one counsel stands for all counsel unless disclaimed *as with respect to the objections to evidence.*" (Tr. of Pr. 1397).

Thus the evidentiary procedure of an objection by one being treated as an objection by all, was expressly extended to the motions outside the presence of the jury. And even before that time, it was clear that an objection by one was an objection by all, not merely in the presence of the jury, but as to the total record. At an earlier stage, when one counsel had moved for mistrial (Tr. 1224), the court expressed its understanding as follows:

"You gentlemen have made motions for a mistrial on behalf of all the defendants, which I will deny." (Tr. 1230). This accorded with the court's desire to reduce the number of rulings. When petitioner's counsel attempted to re-state an objection on one occasion, the court objected: "How many times do I have to rule on it? I have ruled." (Tr. 1187).

It is manifestly unfair to suggest that counsel avoid restatement of objections and then to claim, as the government has done here, that there was no express agreement that each should benefit by the other's objections. But it is not necessary to decide the issue in terms of fairness. The court expressly stated that, "Any motions made by one counsel stands for all counsel unless disclaimed." (Tr. 1397). That is quite clear enough. And we regard it as telling, that the government feels free to make the point in that factual posture.

The government's contention that the defendants agreed that the jury should separate, stands on no better footing. The court had announced, unequivocally, that it intended to release the jury to their homes, notwithstanding the defense objection (G. Br. 6). The colloquy on which the government relies (G. Br. 6, 7) shows nothing more than that when the court outlined the *details* of the separation procedure, that defense counsel first asked for a chance to confer, but then immediately stated that no conference was necessary in order to object to a part of the procedure. This is a far cry from agreeing to the remainder of the procedure. And this occurred *after* the court had clearly announced its intention to release the jury over defense objection. As the court had earlier observed, "How many times do I have to rule on it? I have ruled." (Tr. 1187).

2. The improper use of the grand jury.

(a) The government takes comfort in the fact that the defendant did not testify before the second grand jury. It was not necessary that he do so, in order that his rights be invaded. The agents who did in fact testify, were fully familiar with what had happened before. And it is manifestly unfair that the government attempts to tell

your Honors (Br. 11, Fn. 6) that only competent evidence was used; for, having withheld the information in the trial court, the government is certainly in no position to state now, as it does, that there is no reason for its secretiveness.

Of course, as the government contends, the defendant does not know whether his prior testimony was used in any manner before the subsequent Illinois grand jury (Br. 11). That is the very thing upon which petitioner predicates his claim of constitutional deprivation.

b) The promise of lenity.

The promise was in fact made. To rationalize, as the government does, that the FBI stated that it had no power to do what it had, is a mere play on words.

3. The evidence of coercion.

a. The government contends that the court possessed "discretion" to exclude the defense testimony. Obviously, if the testimony was competent, the court had no "discretion" to keep it from the jury. And the government does not contend that it was incompetent.

Rather, the government states that the testimony would not have established a defense of coercion. At the same time, the government takes comfort in the fact that the jury was instructed on that defense theory. The issue was properly presented or it was not; but the government cannot have it both ways.

b. The erroneous use of grand jury testimony.

The government contends that it was entitled to use prior grand jury testimony to impeach petitioner. But that begs the issue. The government was not entitled to use *illegally obtained* evidence for any purpose.

CONCLUSION.

For the reasons stated in our original petition, we urge that this is a proper case to merit this court's attention, and pray that a writ of certiorari be granted.

Respectfully submitted

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vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

PAGE

AUTHORITIES CITED

Cases

Brown v. United States, 99 F. 2d 131 4

Cephus v. United States, 324 F.2d 893, (D.C. Cir. 1963) 8, 9

Cooper v. United States, 218 F.2d 39 (D.C. Cir. 1954) .. 8

DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962) 9

Hemphill v. United States, 112 F.2d 505 (9th Cir. 1940), reversed, 312 U.S. 657, 61 S.Ct. 729 9

Holt v. United States, 218 U.S. 245 4

Kleven v. United States, 240 F. 2d 270 4

Lucas v. United States, 275 Fed. 405 5

Salt Lake City v. Smith, 104 Fed. 457, 470 (8th Cir. 1900) 2

Sanchez v. United States, 293 F. 2d 260 (8th Cir. 1961) 2

United States v. D'Antonio, 342 F. 2d 667, 668, 669 .... 3, 4

Wheeler v. United States, 165 F. 2d 225 4

Rule

Rule 29, Federal Rules of Criminal Procedure, 18 U.S.C. 8

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

1. The Government suggests that implied agreement on the part of Petitioner Di Fronzo's trial counsel to the separation of the jury can be inferred from the failure of counsel to renew his express objection, made a few hours earlier, at the time when the trial judge re-affirmed his previously stated intention to allow the jury to separate. The Government at least recognizes that counsel

for Di Fronzo did expressly object to the trial judge's announced intention to permit the jury to separate for the night. To this extent it corrects the false impression created by the decision of the Court of Appeals for the Seventh Circuit that "* * * the trial court counsel for each of the defendants agreed to the procedure outlined and followed by the trial judge * * *" (Opinion, Appendix 1, p. App. 2) The Government, however, advocates a new theory which would make it the duty of defense counsel to protect his record by obdurately making and renewing his objections at every opportunity. That theory of procedure has been universally and uniformly rejected. In *Salt Lake City* v. *Smith,* 104 Fed 457, 470 (8th Cir. 1900), the court said:

> "* * * When a question has once been fairly presented to the trial court, argued, and decided, * * * it is neither desirable nor seemly for counsel to continually repeat their objections * * * *"

And see *Sanchez* v. *United States,* 293 F. 2d 260 (8th Cir. 1961). The trial judge in the instant case was cognizant of this rule of procedure and, on at least one occasion, sharply enforced it and properly rebuked counsel for renewing an objection where no occasion for the renewal existed. (See *e.g.,* Rec. 1187) Obviously, the trial judge did not want counsel to re-state their objections where no good reason existed for their so doing, and to suggest that counsel for Di Fronzo "impliedly agreed" by failing to re-state or renew an objection fully made and ruled upon at the first instance not only ignores well established precedents but invites counsel to seek the rebuke of the trial judge.

The Government next suggests that some weight be given the fact that the point herein was raised in a supplemental brief in the Court of Appeals. This argument

ignores completely, however, the fact that the objection was timely made in the trial court, that a ruling was made thereon, and that the Court of Appeals considered the assignment of error. Whatever reason appellate counsel in the Court of Appeals may have had for not including the point in his original brief, has no bearing on whether Petitioner can be deemed to have "agreed" to the procedure in the trial court. Petitioner, through his trial counsel, expressly objected to the procedure; the trial judge felt that the procedure was proper. The Court of Appeals did not weigh the fact that Petitioner had made his claim in a supplemental brief; it incorrectly ruled that Petitioner had agreed to the procedure. No great amount of perception is required to see that the Government places little faith in this appraisal.

Next the Government argues that *D'Antonio* can be distinguished from the instant case on its facts and refers to the facts that there the trial court failed to admonish the jury and that a marshal communicated with the jury. From this interpretation the government reads *D'Antonio* as resulting from a combination of the foregoing factors. But the record in *D'Antonio* was silent as to what, if anything, the marshal had said to the jurors, or whether anyone else had said anything to them. All that the record did indicate was that the trial judge had instructed the marshal to deliver a cautionary instruction to the jury. *United States* v. *D'Antonio,* 342 F. 2d 667, 668. From this it must be assumed that no actual prejudice was shown, and that the Court of Appeals did not consider any evidence of actual prejudice in arriving at its decision. *D'Antonio* should be read as holding that marshals and others will not communicate with the jurors and that cautionary instructions will not be required

where the trial court adheres to the historical right of a defendant "to have his case decided by a jury whose secret *deliberations* are not interrupted by the court's order permitting them to *separate* before a verdict has been reached." *United States* v. *D'Antonio,* 342 F. 2d 667, 669. Certainly the court's statement that: "All of these *possibilities* could be avoided by handling everything according to time-honored practices," (Emphasis added; *United States* v. *D'Antonio,* 342 F. 2d 667, 668), can have no other meaning. And, as argued in our Petition, the rule adopted by the Seventh Circuit admits of the existence of these "possibilities" and forbids separation as a prophylactic devise. D'Antonio did not show actual prejudice; he complained of a situation fraught with danger—danger that "Dispersement into the city at night of a group of men and women who have been deliberating in the security of the courthouse [would subject] them to the risk of being individually importuned, if not threatened, by telephone calls or personal contacts." *United States* v. *D'Antonio,* 342 F. 2d 667, 670. Similarly, the Petitioner here shows a situation fraught with the same danger and asks application of the identical prophylactic devise for the identical reason that such devise was applied in *D'Antonio.*

Finally, the Government would discard the *D'Antonio* rule and have this Court deny Certiorari on the basis that the question of separation is within the sound discretion of the trial court. In support of this argument the Government cites cases, all of which were considered, distinguished and rejected by the Court of Appeals in *D'Antonio. United States* v. *D'Antonio,* 342 F.2d 667, 669-70. *Holt* v. *United States,* 218 U.S. 245, and *Wheeler* v. *United States,* 165 F. 2d 225, involved separations during trial, not during deliberations. In *Brown* v. *United States,* 99 F. 2d 131, counsel for the defendant agreed to the separation. In *Kleven* v. *United States,* 240 F. 2d 270,

counsel failed to object to the failure to admonish when separation was permitted, thus not only failing to preserve the point regarding the failure to admonish for review, but stopping short of the issue whether separation during deliberation could be permitted. In *Lucas* v. *United States,* 275 Fed. 405, the court was unable to provide quarters to accommodate the jurors, so other forces prevented the application of the rule against separation.

The decision of the Seventh Circuit in D'Antonio points with clarity to the compelling reasons for a rule proscribing separation. Contrary to the Government's assertion, the decision was not based upon special facts, it was based upon the very real possibility of prejudice. That same possibility, by definition, existed in the present case, and the Petitioner objected, as clearly and certainly as he could, to any procedure which would deny him protection against the possibility.

2. In answer to the Petitioner's claim that his conviction constituted a denial of due process because of the absence of any evidence to sustain that conviction, the Government has asserted that Petitioner's conviction was justified because he was identified as one of three persons who occupied a 1961 Pontiac automobile while it followed a truck, loaded with stolen merchandise, in interstate commerce. (Brief for the United States in Opposition, pp. 4, 17) The Government reaches the conclusion that Di Fronzo was one of the occupants of the Pontiac at the time while it was following the truck because of its conviction that "One of the persons got out of the car and drove the remaining truck with stolen merchandise aboard to an Illinois town and abandoned it." (Brief for the United States in Opposition, p. 17) There is no controversy over the fact that Petitioner Di Fronzo was the person who drove the truck to Stone Park, Illinois, and

abandoned it. Petitioner, however, contests the adequacy of the record as showing that he got out of the Pontiac before driving the truck to Stone Park, Illinois. The Government's insistence that the record adequately discloses this raises new issues which should be decided by the Court as a complement to the point raised herein by Petitioner.

Di Fronzo was not identified by any Government witness as having been in the Pontiac at the time it was following the truck driven by Daddino to Wisconsin. Agent James H. Thompson of the F.B.I., who was observing the Calzavara farm, did not see the Pontiac return to the farm from its trip to Wisconsin Tuesday morning, May 2. (App. 17-18) Consequently, he did not see anyone get out of the Pontiac, or get out of the Pontiac and into the truck which was eventually driven to Stone Park, Illinois. Nor did any Government witness testify as to any fact that would permit an inference that Di Fronzo was in the Pontiac in Wisconsin.

At the conclusion of the Government's case, Petitioner Di Fronzo moved the court for a judgment of acquittal. (App. 43) Counsel for Di Fronzo argued the motion, (Rec. 1423-1434), and the court announced, in overruling the motion, that there was sufficient evidence to submit the case to the jury because they could infer guilt from the proven facts that Di Fronzo had been seen in the Pontiac on May 1st[1]. (Rec. 1428) Thereafter the defendant Calzavara

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[1] The Government says, (Brief for the United States in Opposition, p. 3), that "About 8:00 p.m. on May 1, 1961 petitioner DiFronzo took the 1961 Pontiac to a rendezvous with a tractor-trailer unit rented earlier that day by co-defendant Daddino in Chicago and followed it back to the Calzavara farm (J.A. 15, 19, 32-33, 36, 38)." While Daddino rented the tractor-trailer, it was allegedly John Torello, eventually acquitted by direction of the trial court, who was in the truck at the time in question (App. 19).

took the stand in his own defense. During his cross examination the following took place:

* * *

By Mr. Bailey:

Q. How many individuals were in the Pontiac [when it arrived at the Calzavara farm at approximately 5:30 A.M. on May 2, 1961]?

A. If I recall there were three.

Q. Now, did one of the individuals in the Pontiac get out and drive—to drive the truck?

A. Yes.

* * *

Q. And the one individual who got out of the Pontiac got into the truck, right?

A. Right.

Q. Did that truck leave at that time?

A. I don't know what time it was. I left and it went west on—

* * *

(Rec. 1647)

From this testimony the Government concludes that Di Fronzo was an occupant of the Pontiac while it followed the truck driven by Daddino in Wisconsin. (Brief for United States in Opposition, p. 17)

The Government, as a result, is not seeking, as indeed it cannot seek, to sustain the verdict of the jury or the judgment of the Court of Appeals for the Seventh Circuit on the basis of evidence introduced by the Government in the Government's case. The Government's Brief contains the *sub-silencio* admission that the evidence introduced by it was not sufficient, for to support its claim that the evidence was sufficient to support the conviction the Government has and must refer to the evidence elicited from Calzavara on his cross examination. The

Petitioner, however, in the trial court, challenged the sufficiency of the Government''s evidence by a motion for judgment of acquittal, (Rule 29, Federal Rules of Criminal Procedure, 18 U.S.C.) At that time it was the function of the trial judge to determine if there were evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If there were no such evidence it was the duty of the judge to grant the motion. *Cooper* v. *United States,* 218 F.2d 39 (D.C. Cir. 1954). Similarly, the Petitioner challenged the denial of his motion for a judgment of acquittal in the court of appeals. That court's decision does not indicate whether its judgment was based upon the testimony of Calzavara.

Calzavara's choice to testify after the denial of DiFronzo's motion for judgment of acquittal at the close of the Government's case does not operate as a waiver by Petitioner of his motion.[1] See, *Cephus* v. *United States,* 324 F.2d 893, (D.C. Cir. 1963) The Petitioner did not testify, and the only testimony which he offered was that of F.B.I. Agent Malone who was recalled by Petitioner to testify that he had not recorded in a report which he made on May 4, 1961, the fact that he had seen Petitioner in a Pontiac on May 1, 1961, at 8:00 P.M.[2] (Abst. 58) Under the circumstances such action

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[1] In fact, petitioner moved before trial (Supp. App. DiFronzo, p. 15), and after Calzavara's testimony, (App. 62) for a separate trial.

[2] The trial court, in the exercise of its discretion, refused to permit counsel for DiFronzo to recall Agent Malone for further cross examination on this point during the Government's case. (Rec. 1178)

could hardly be deemed a "waiver" of the motion for acquittal at the close of the Government's case. See, *Cephus* v. *United States,* 324 F.2d 893. In any event, Petitioner renewed his motion for judgment of acquittal at the close of all of the evidence. (App. 62) Such a motion preserves the validity of the court's ruling on the first motion for acquittal. Cf. *Hemphill* v. *United States,* 112 F. 2d 505 (9th Cir. 1940), reversed, 312 U.S. 657, 61 S. Ct. 729.

By referring to and relying on Calzavara's testimony to sustain the judgment—and only that testimony supplies any link between Petitioner and interstate activities, the Government has created a further issue to be decided by the Court: Where a defendant relies upon the insufficiency of the Government's case and does not essentially introduce evidence of his own, may a judgment of conviction be sustained solely on the basis of evidence offered by another defendant in his own defense? We submit that an affirmative answer will destroy the concept of an an adversary system of trials and convert the traditional concept that the prosecution must prove a defendant guilty beyond all reasonable doubt into a jungle where the defendant has not only to defend himself from the prosecution but from his co-indictees as well. The convenience of joinder of defendants does not admit of such drastic consequences. See, *DeLuna* v. *United States,* 308 F.2d 140 (5th Cir. 1962).

CONCLUSION.

For the above and foregoing reasons, it is respectfully prayed that a writ of Certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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SHERMAN C. MAGIDSON,
On the Brief.

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No. 286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PETER DiFRONZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE UNTIMELY PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND PETITION FOR REHEARING.

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MOTION FOR LEAVE TO FILE UNTIMELY PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Peter DiFronzo, respectfully moves for leave to file an Untimely Petition for Rehearing of an Order of this Court denying a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit entered on October 11, 1965. This relief is sought at this time because of a subsequent decision of the United States Court of Appeals for the Seventh Circuit, entered on December 21, 1965, that permitting a jury to separate over night during its deliberations on a verdict in a criminal case is reversible error. *United States* v. *Panzcko*, 7th

Cir. 1965, 353 F.2d 676. As is explained more fully in the annexed Petition, this decision adhered to an earlier decision of that Court, *United States* v. *D'Antonio*, 7th Cir. 1965, 342 F.2d 667, which preceded the decision herein in the court below. *United States* v. *DiFronzo*, 7th Cir. 1965, 345 F.2d 383.

Although this Petition is filed after the expiration of time prescribed in Rule 58, one of the grounds upon which it is based, namely the decision in *United States* v. *Panzcko, supra,* arose after such time. Thus, the Court has the discretionary power to entertain the Petition. 28 U.S.C. 452; see, *Clark* v. *Manufacturers Trust Co.*, 337 U.S. 953, 338 U.S. 241, 242; *Cf. Sacher* v. *United States*, 342 U.S. 858.

Moreover, it is respectfully urged that the interests of justice, especially in view of the claimed deprivation of equal protection and due process effected by the conflicting opinions of the Seventh Circuit, require reconsideration of the Petition. *Cf. Grondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25.

The Petitioner began service of the sentence imposed upon him by the United States District Court for the Northern District of Illinois, Eastern Division, in November 1965. He is presently confined under that sentence and judgment at the United States Penitentiary in Leavenworth, Kansas. This Petition, therefore, could not conceivably be, and is not, filed for the purpose of delay.

Dated: May 17, 1966

CHARLES A. BELLOWS

GEORGE F. CALLAGHAN
Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 286

PETER DiFRONZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Peter DiFronzo, prays that this Court grant a rehearing of the Order of October 11, 1965 denying his Petition for a Writ of Certiorari, and that said Writ issue to review the Order of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, as prayed in the Petition.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

(A) History of the Controversial Issue:

Prior to the decision of the United States Court of Appeals for the Seventh Circuit in *United States* v. *D'Antonio,* 7th Cir. 1965, 342 F.2d 667, no authority in the Federal Courts established that it was reversible error to permit a jury to separate overnight during its deliberations in a criminal case over the objections of the defendant. The Seventh Circuit found that a defendant, "when on trial upon a charge of the commission of a felony, [has a historical right] to have his case decided by a jury whose secret *deliberations* are not interrupted by the court's order permitting them to *separate* before a verdict had been reached." *United States* v. *D'Antonio, supra,* at 669. The court arrived at this conclusion after considering *Commonwealth* v. *Della Porta,* 324 Mass. 193, 85 N.E.2d 248 (1949), and cases cited therein. In so doing, the court either rejected or distinguished holdings in the Eighth and District of Columbia Circuits and a *nisi prius* decision in the Sixth Circuit. *Lucas* v. *United States,* 8th Cir. 1921, 275 Fed. 405; *Kleven* v. *United States,* 8th Cir. 1957, 240 F.2d 270; *McHenry* v. *United States,* D.C.Cir. 1921, 276 Fed. 761; *Wheeler* v. *United States,* D.C.Cir. 1947, 165 F.2d 225; *United States* v. *Davis,* 6th Cir. 1900, 103 Fed. 457.

Two months later, in the instant case, the Seventh Circuit rejected Petitioner's contention that the District Court had erred in permitting the jury to separate after it had commenced its deliberation on the mistaken premise that

> "* * * the trial court counsel for each of the defendfendants agreed to the procedure outlined and fol-

> lowed by the trial court in this respect. * * *"[1] *United States* v. *DiFronzo,* 7th Cir. 1965, 345 F.2d 383, 385.

The court also noted, parenthetically, that: "Moreover, there is no claim that the separation actually resulted in anything prejudicial to any of the defendants." *United States* v. *DiFronzo, supra,* at 385 n. 1.

Approximately six months after this decision, the Seventh Circuit announced its decision in *United States* v. *Panzcko,* 7th Cir. 1965, 353 F.2d 676. The court observed:

> "* * * [T]he principles which we recognized in D'Antonio had long existed and were binding on the District Court in the case now being reviewed. The facts in the record in the case at bar as to the separation of jurors at a late hour at night, leaving each to find the way to his or her respective home, merely further emphasizes the need for applying the established rule which we later reiterated in D'Antonio.
>
> "We hold that the failure by the court to sequester the jury overnight during its deliberations had a two-pronged effect, first, of exposing the released jurors to exposure to those who might, by printed or spoken word, attempt to influence their official action, and secondly, imposing upon the jurors, especially the women, unnecessary and serious inconvenience. * * *" *United States* v. *Panzcko, supra,* at 678.

Circuit Judge Duffy, concurring in the result, was dissatisfied with the criteria of inconvenience to the jurors. He felt that:

> "Consistent with our decision in United States v. D'Antonio, 342 F.2d 666, we *must* hold that it was reversible error to permit the jury in this case, over the objections of the defendant, to separate during its de-

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[1] The Solicitor General, in his Brief in Opposition to Petitioner's Petition for a Writ of Certiorari, specifically recognized and conceded the error of this position. Brief for the United States in Opposition, p. 8. See, Point (B), *infra.*

liberations." *United States* v. *Panzcko, supra,* at 679 (concurring opinion; emphasis added).

(B) Inaccuracy of the Lower Court Ratio Decidendi:

As noted above, the Court of Appeals rejected Petitioner's assignment of error on the ground that he had agreed to the procedure followed by the trial court. But counsel for Petitioner *unequivocally* and *expressly* objected to the trial court's proposal that the jury be allowed to separate overnight. Mr. Callaghan said, in response to the pronouncement by the trial court:

> "I would have no objection, if your Honor please, if your Honor came back at 10:30, 10:40, whatever the hour might be, to then agreeing upon a sealed verdict which would be signed, sealed and delivered on Monday morning, *but I would have an objection* [*to*] *the jury separating.*"

The trial court clearly understood this objection, ruling:

> "This is standard practice, Mr. Callaghan, *and I am going to do it.*" (Emphasis added)

See, Supp.App.Calzavara, p. 7; Supp.Tr., p. 7; Gov't Supp. Br., p. 5A. Furthermore, the Solicitor General has, in this Court, recognized that such objection was interposed.[2]

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[2] Although the Solicitor General did recognize that the Seventh Circuit had grossly misconstrued the Record below, he argued, in opposition to the Petition for the Writ of Certiorari, that

> " * * * implied agreement [to the proposal of the trial court to permit the jury to separate] can reasonably be inferred from the final Friday night session in which the court again outlined the procedure it intended to follow and expressly solicited objections thereto (Gov't Supp. Br. App. 6a). Mr. Callaghan objected to part of the procedure but did not *renew* his objection to separation of the jury. Nor was the objection renewed when the court instructed the jury and permitted them to proceed to their homes for the night. * * * " Brief for the United States in Opposition, pp. 8-9. (Emphasis added.)

(Brief for United States in Opposition to Petition for Writ of Certiorari, p. 8)

Despite the patency of this error by the Court of Appeals there appeared to be a possible alternative basis for accepting its decision at the time Certiorari was denied. In *D'Antonio* the trial court failed to give a cautionary instruction prior to separation and improperly permitted off-the-record conversations between a Marshal and the jury.[3] Quite clearly this was the meaning of the footnote reference in *DiFronzo* that "* * * there is no claim that the separation actually resulted in anything prejudicial to any of the defendants."

We pointed out in the Reply to the Brief for the United States in Opposition (p. 2), and we take the liberty of again pointing out, that Judge Will, before whom this case was tried, was cognizant of and rigidly followed the established rule that

> " * * * When a question has once been fairly presented to the trial court, argued and decided, * * * it is neither desirable nor seemly for counsel to continually repeat their objections. * * *" *Salt Lake City* v. *Smith,* 8th Cir. 1900, 104 Fed. 457, 470; and see, *Sanchez* v. *United States,* 8th Cir. 1961, 293 F.2d 260; *cf. Simpson* v. *United States,* 10th Cir. 1965, 346 F.2d 291, 294.

On at least one occasion during the trial the trial judge sharply rebuked counsel for renewing and restating an objection where the objection had already been fully stated. (Rec. 1187) The argument that the trial judge merely proposed during the first conference to allow the jury to separate is amply rebutted by the court's statement, following Mr. Callaghan's express objection, that

> "This is standard practice, Mr. Callaghan, *and I am going to do it.*" (Gov't Supp. Br. App. 5a; emphasis added.)

[3] The Record in D'Antonio did not indicate whether there had in fact been any communications between the marshal and the jury. The marshal was given a statement to read to the jury. The Record did not reflect whether the statement was read as given or whether any further communication took place. *United States* v. *D'Antonio, supra,* at 668.

The decision in *Panzcko,* however, completely eliminates any possible claim that a showing of actual prejudice is a prerequisite for reversal and dispels any thought that *D'Antonio* might have required it. There was no showing of actual prejudice to *Panzcko* and those matters concerning possible exposure to extraneous influences and inconvenience to jurors were present in the instant case and are present in every case. Judge Duffy's concurring opinion, as well as the majority opinion, clearly reflect that the Seventh Circuit absolutely forbids permitting a jury to separate overnight during its deliberations, over the objection of the defendant, regardless of a subsequent showing of actual prejudice.

(C) Reason for Granting the Petition:

Petitioner occupies the unique position of having had his appeal in the Seventh Circuit rejected on a false premise and having had his Petition for Certiorari rejected, in all probability, on a premise since abandoned or never intended by the Seventh Circuit. From a more practical point of view he has been denied the same relief granted his immediate successor and predecessor upon identical factual and legal grounds. From this point of view the concepts of Equal Protection and Due Process are considerably strained. "The interests of justice" would make unjust a further denial of the relief sought by Petitioner. *Cf. Grondeck* v. *Pan American World Airways, Inc.,* 382 U.S. 25.

There is another reason why the Court, even at this time, should issue its writ. While the question of allowing jurors to separate overnight during their deliberations was imperfectly presented by the *D'Antonio* decision because of the possible communication between the marshal and the jurors, no such imperfection appears since the decision in

Panzcko. There, as Judge Duffy recognized, the court accepted the principle that jurors must not be allowed to separate during their deliberations. This "intervening circumstance," the decision finally reached in *Panzcko* by the same court which denied the precise relief to Petitioner, not only has a profound effect on the footnoted reference in this case that Petitioner had not demonstrated any prejudice in the court below, but it presents a perfected issue concerning the administration of justice in the Federal Courts to be decided by this Court—*viz.* whether jurors may separate overnight during their deliberations in a criminal case, irrespective of considerations of demonstrable prejudice. Speaking plainly, if Panzcko and D'Antonio were entitled to relief, Petitioner should also be entitled to relief. Consistency, as noted by Judge Duffy, demands no less. See, *United States* v. *Panzcko, supra,* at 679 (concurring opinion):

> "*Consistent* with our decision in United States v. D'Antonio * * * we *must* hold that it was reversible error to permit the jury in this case to separate during its deliberations." (Emphasis added.)

The issue is one which is not only apt to arise in the other Circuits but it is also apt to arise in the Seventh Circuit under the present state of affairs. Thus, in the final analysis this Court should decide the issue whether separation is erroneous *per se.* Because of the reasons underlying the proscription against separation—that a defendant (and, we assume, the Government) has an historical right to have his case decided by a jury whose secret deliberations are not interrupted by the court's order permitting them to separate before a verdict has been reached —and the fact that the proscription is unquestionably intended to act as a prophylactic devise, this is the only logi-

cal decision. *Panzcko* recognized this; even *D'Antonio* did not require a showing of actual prejudice but noted instead the existence of possible prejudice. The same possibility exists in every case where the jury is enlarged during the period of its deliberations. And for this reason review by this Court would correct the manifest injustice done Petitioner by the decision below which because of a mistaken premise denied him the relief granted D'Antonio and Panzcko.

Petitioner respectfully urges that this Court grant a rehearing of its order of October 11, 1965, and that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois.

Respectfully submitted,

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